14-662 Filed

Jan. 25. 1882

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 860.

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 11, 1881.

14-663

Jan. 25. 1882

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 660.

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 13, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 860.

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,

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THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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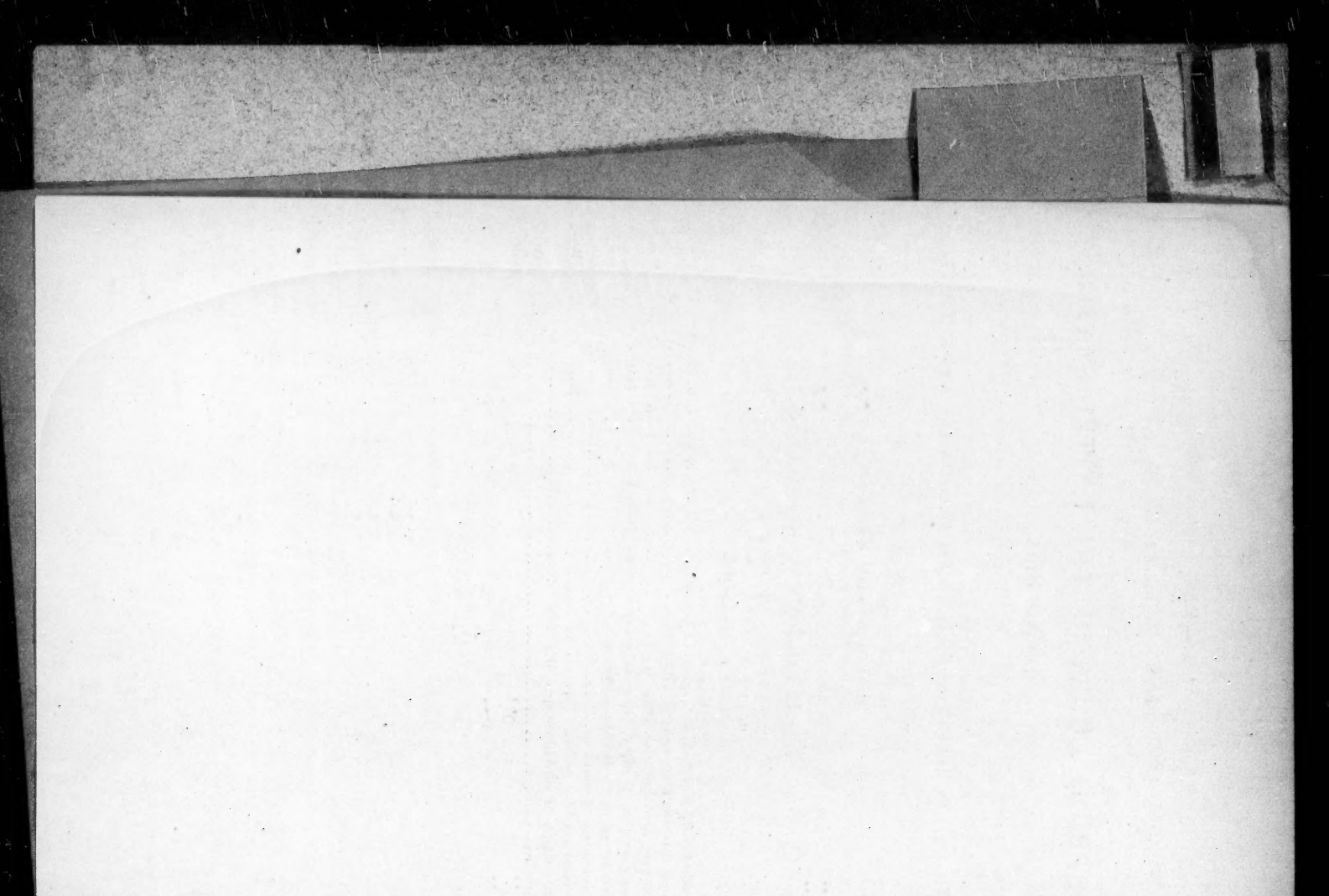

1 I.—*Petition.*—*Filed April* 14, 1881.

United States Court of Claims.

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES OF AMERICA. } No. 12515.

To the honorable the judges of the Court of Claims:

Your petitioner, The Union Pacific Railroad Company, respectfully represents:

That it is a corporation duly organized under the laws of the United States.

That in and by an act of Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the several acts amendatory thereof, approved July 2, 1864, March 3, 1865, and July 3, 1866, certain rights, powers, donations, grants of land and bonds, rights of way, privileges and franchises were given and granted to the said Union Pacific Railroad Company, for the purpose of aiding said company in the construction of its railroad and telegraph line, and that the said acts were duly accepted, and its said railroad and telegraph line were duly constructed in conformity therewith by your petitioner.

That under and in pursuance of said acts of Congress, United States bonds, payable in thirty years from their date, bearing interest at 6 per cent. per annum, payable by the government semi-annually in lawful money of the United States, were issued in aid of the construction of said railroad, to the amount of $27,236,512.

That the grants aforesaid were made upon condition that said company should pay said bonds at maturity, and should keep said railroad and telegraph line in repair and use, and should at all
2 times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service.

That under and in pursuance of the fifth section of the act of Congress approved July 2d, 1864, amending the act of Congress of July 1st, 1862, above referred to, and the act of Congress approved March 3, 1871, one-half of the amount that might become due to your petitioner for the carriage and transportation of the mails, troops, munitions of war, supplies and public stores for the United States Government over the railroad of your petitioner, was to be applied to the payment of the bonds issued by the government in aid of the construction of said road; and that the remaining half of said amount was to be paid to your petitioner in money, and not to be withheld or applied to the payment of said bonds or the interest thereon.

That your petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to the rebellion against the said government.

Your petitioner further states that at various times since the bonds of the United States were issued in aid of the construction of its road as aforesaid, your petitioner has performed service for the Government of the United States, at the request of, and whenever required to do so by, the Post-Office Department, in the transportation of the mail and postal clerks or agents upon its railroad.

That up to and including the 31st day of December, 1875, the claim of your petitioner against the government for the transportation of the mails has been adjusted upon terms prescribed by the Post-Office Department, which terms afforded a compensation to your petitioner considerably less than the amounts charged to and paid by private parties for the same kind of service at the same dates. That your petitioner, since said 31st day of December, 1875, and down to the 30th day of September, 1877, has rendered services to the United States in the carriage and transportation of the mails of the United States for
3 the Post-Office Department, and also in the transportation of postal clerks and agents of the United States, employed in, or connected with, the transportation or distribution of the mails. A true and correct statement thereof, and of the sums due therefor, according to its best knowledge and belief, is contained in the statement or schedule marked Exhibit A, hereto annexed.

And your petitioner states that, being dissatisfied with the allowance or credits heretofore made or given by the government to it for the transportation of the mails as aforesaid, the same not being fair and reasonable nor equivalent to the charges made to and paid by private parties for the same kind of service, and your petitioner having, to avoid controversy for the time being, theretofore reluctantly submitted to the reduced charge for such services so allowed by the government, did, on the 1st day of September, 1876, give notice to the Postmaster-General of the United States that, from and after the 1st day of February preceding, your petitioner would require from the government compensation for the transportation of the mails at fair and reasonable rates, and at the rates paid by private parties for the same kind of service, and your petitioner hereto annexes a copy of said notice to the Post-Office Department (marked Exhibit B), and asks that the same may be deemed and taken as part of its petition.

And your petitioner thereafterwards made out and rendered to the proper department of the government its claim up to and including the 30th day of November, 1876, for services to the United States in the carriage and transportation of the mails to a fair and reasonable amount, not exceeding the amounts which are charged to private parties for the same kind of service at the same dates; but as to the residue of its said claims for the transportation of the mails down to the 30th day of September, 1877, hereinbefore referred to, it has not made out nor rendered its claim by reason of the refusal of the Postmaster-General to allow the claim thus rendered upon the grounds alleged by him hereinafter mentioned; that a correct statement of all your petitioner's said claims for the transportation of the mails of the United States for the Post-Office Department down to and including the said 30th day of September, 1877, and for the transportation of postal clerks or agents as aforesaid, is contained in said schedule hereto annexed, and in said schedule your petitioner has, according to
4 its best knowledge and belief, set out the sums respectively due from the United States for said service in the transportation of the mails of the United States, and postal clerks and agents, and that the whole amount thus earned and due from the United States is the

sum of $1,161,720.25, and your petitioner asks that said statement or schedule hereinbefore referred to may be taken and deemed as part of its petition.

That one-half of said sum so earned by your petitioner (namely, the sum of $580,860.13) should be applied by the Government of the United States to the payment of the bonds issued by the government in the aid of the construction of the railroad of your petitioner, and the other half of said sum so earned (namely, the sum of $580,860.12) should be paid over in money to your petitioner, and that the same is now due to your petitioner and remains unpaid by the government.

That your petitioner alone is the owner of said claims, and the consideration therefor was the service performed by your petitioner, as above stated.

That the Postmaster-General of the United States also refuses to allow and pay to your petitioner the said claims which are now due and payable to your petitioner for the transportation of the mails and postal clerks and agents as aforesaid, alleging, as your petitioner is informed and believes, as a reason for such refusal, that the sums so claimed for mail services aforesaid are not charged at fair and reasonable rates; that the rates payable for such service have, since the passage of the said acts constituting the charter of your petitioner, been fixed and defined by law, and that your petitioner is bound thereby; and, further, that your petitioner is not entitled to compensation from the government for the transportation of its said postal clerks or agents.

That your petitioner has, pursuant to law, been consolidated with the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company, by articles of union and consolidation, bearing date January 24, 1880, under the name of the Union Pacific Railway Company; but that by those articles of consolidation the corporate existence of your petitioner is to remain and continue, so far as neces-'ary, to carry out the intent and purposes of said consolidation, among which is the collection of sums due your petitioner, and this petition is brought for the use and benefit of said consolidated corporation, the said Union Pacific Railway Company.

5 Your petitioner, therefore, respectfully prays that this honorable court will render judgment in favor of your petitioner and against the United States, as follows, to wit:

First. That the United States be decreed to pay to your petitioner one-half part of the amount so earned by it for the said services so performed for the government as hereinbefore stated, amounting to the sum of $580,860.12.

Second. That the United States give to your petitioner credit on account of the bonds so issued by it to your petitioner for the remaining one-half part of the amount of its said claim, which half part amounts to the sum of $580,860.13.

Your petitioner prays for such other and further relief in the premises as may be equitable and just, and will ever pray, &c.

THE UNION PACIFIC RAILROAD COMPANY,
Petitioner,
By E. ATKINS, *its Vice-President*.

S. BARTLETT, *of Counsel*.

STATE OF MASSACHUSETTS,
District of Massachusetts, ss:

Elisha Atkins, of the city of Boston and State aforesaid, being duly sworn, deposeth and saith that he is the vice-president of the Union

Pacific Railroad Company, the petitioner in the foregoing petition named, and of the Union Pacific Railway Company; that no assignment or transfer of the claims set forth in said petition, or any part thereof or any interest therein, has been made at any time, except by virtue of or under the consolidation of the Union Pacific Railroad, Kansas Pacific Railway, and Denver Pacific Railway and Telegraph Companies, effected according to law by articles of union and consolidation, bearing date January 24th, 1880; that said petitioner is justly entitled to the amounts in said petition claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true; and further deponent saith not.

Sworn to before me this 23rd day of March, A. D. 1881.
[SEAL.] JAMES G. HARRIS,
Notary Public.

6 EXHIBIT A.

Schedule referred to in the foregoing petition.

Quarter ending:		
March 31, 1876.—Transportation of the United States mails from Jan. 1 to Jan. 31, 1876, the period after rwhich the Post-Office Department was notified that the company could not acquiesce in the rate fixed by the Department	$27,095 25	
Amount due the Union Pacific Railroad Co. for transporting the United States mails during the months of February and March, 1876, at the rate charged by the company for performing similar service for others (namely, the transportation of express matter)—see sec. 6 act of 1862—2 months, at $49,731.25 per month	99,462 50	
Total, first quarter of 1876....		$126,557 75
June 30, 1876.—Transportation of the United States mails during the months of April, May, and June, 1876, 3 months, constituting the second quarter of 1876, at $49,731.25 per month		149,193 75
Sept. 30, 1876.—Transportation of the United States mails during the months of July, August, and September, 1876, 3 months, constituting the third quarter of 1876, at $49,731.25 per month		149,193 75
Dec. 31, 1876.—Transportation of the United States mails during the months of October, November, and December, 1876, 3 months, constituting the fourth quarter of 1876, at $49,731.25 per month		149,193 75
March 31, 1877.—Transportation of the United		

States mails during the months of January, February, and March, 1877, 3 months, constituting the first quarter of 1877, at $49,731.25 per month	149,193 75	
June 30, 1877.—Transportation of the United States mails during the months of April, May, and June, 1877, 3 months, constituting the second quarter of 1877, at $49,731.25 per month	149,193 75	
Sept. 30, 1877.—Transportation of the United States mails during the months of July, August, and September, 1877, 3 months, constituting the third quarter of 1877, at $49,731.25 per month	149,193 75	
		$1,021,720 25
For fares of postal clerks and agents during the period from Feb. 1, 1876, to Sept. 30, 1877, 20 months, at average of $7,000 per month		140,000 00
Total		$1,161,720 25

7 EXHIBIT B.

[Union Pacific Railroad Company. President's office, 23 Nassau st. P. O. box 5446. Sidney Dillon, president.]

NEW YORK, *Sept.* 1, 1876.

Hon. J. N. TYNER,
Postmaster-General:

SIR: By a recent weighing of the mails transported by the company for your department, made in February last, the average daily weight for a period of thirty consecutive days was fifteen thousand pounds.

Under contract with the government (see section 6 of the act of 1862), we are required to perform this service at rates of compensation not to exceed the amount to be paid by private parties for the same kind of service.

The transportation of express matter is performed on the same trains, viz, passenger trains, and is assumed to be the same kind of service. We have accordingly had a careful computation made of the compensation received for express service, and computing the mail service on the basis indicated, gives the annual sum of $596,775, or $49,731.25 per month.

Dating from February 1st, 1876, we shall charge the government this sum monthly for mail transportation, in addition to the fares of such employees and mail agents as the government shall send on our trains.

The company believe the Postmaster-General will concede the correctness of the rule we have adopted as to similar kinds of service, inasmuch as the large increase of mail transportation—the increase having been from 6,000 pounds in 1870 to 10,500 pounds in 1874, and to 15,000 pounds in 1876—is drawn largely from the transportation of gold coin and other express matter, which was formerly done by the express department of the company, and is now largely sent by mail in sealed packages. The weight, as ascertained at the last weighing, will be as-

sumed as the daily amount transported until the government or the railroad company request a reweighing.

8 We assume this is very fair toward the government, inasmuch as the mail matter is constantly increasing, as the figures we have alluded to show. The compensation we now propose to charge is less than that allowed us from 1870 to 1874.

Very respectfully,

SIDNEY DILLON, *Pres't.*

Post-office address of claimant: Union Pacific Railroad Company, 44 Equitable Building, Boston, Mass.

Sidney Dillon, president, 23 Nassau street, city of New York.

Post-office address of claimant's attorney: S. Bartlett, 13 Exchange street, Boston, Mass.

9 II. *Counter-claim.—Filed April* 27, 1881.

And now comes the Attorney-General on behalf of the United States, and says that the above-named claimant, before and at the time of the commencement of this suit, was and still is indebted to the defendants in a large sum of money, to wit, in the sum of $750,000, which the defendants set up as a counter-claim herein, and sets forth the grounds of such defense as follows, namely:

That prior to the 6th day of November, 1869, the claimant was organized as a corporation under and by virtue of the act of Congress approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for

10 postal, military, and other purposes," for the purposes and upon the terms and conditions in said act, and in sundry acts additional to and amendatory of said act specified, which act was assented to by the corporation claimant as therein prescribed; and the claimant, from the time of such organization and assent, hitherto has accepted, appropriated, and exercised all the rights, franchises, powers and privileges, gifts and grants, the said act and subsequent acts provided or conveyed, but subject to all the requirements and conditions thereto annexed, as in the said act and acts expressed; all of which the claimant thereby agreed to perform, and became and is bound to fulfil.

That among other privileges, gifts, and grants the claimant, for the purposes mentioned in said act of July 1, 1862, obtained from the defendants, for its use and benefit, a grant or grants of bonds of the United States bearing six per centum per annum interest, amount-

11 ing to a very large sum, to wit, to the sum of $30,000,000, which were issued to the claimant for the purpose and in the manner provided by the fifth section of said act, upon which bonds interest, as aforesaid, thereafter and hitherto has accrued to a large amount, to wit, to the amount of $10,000,000, over and above any sums paid by or accredited to the claimant in that behalf, which said amounts of said bonds and of interest accrued are as yet wholly unpaid by the claimant to the defendants; nor has the claimant's obligation in respect of the said bonds and the said accrued interestt hereon been in any wise cancelled or discharged, although the defendants have hitherto paid the interest on said bonds to the holders thereof semi-annually, as the same has become due, and although the claimant has ever been and is under the obligation to provide for and pay the said indebtedness as hereinafter set forth.

That among other requirements and conditions upon which the
12 last-mentioned and other grants in said act were made and accepted by the claimant, it is provided in the sixth section of said act that when the railroad which the corporation to be organized thereunder was therein authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy should be completed; at least five per centum of the net earnings of said road should annually be applied by the said corporation to the payment of the bonds, which, by the provisions of the said act, should be issued to said corporation as aforesaid, and the interest thereon, until, by such and other payments to that end, said bonds and interest should be paid.

And the defendants aver that the claimant, being organized as aforesaid, and exercising the powers and franchise aforesaid, laid out, located, constructed, and furnished the railroad and telegraph line mentioned in the petition, and completed the said road within
13 the meaning and intent of the said provision of the sixth section of said act on the 6th day of November, in the year one thousand eight hundred and sixty-nine, and has ever since maintained and en-
J. R. joyed the same as a completed road in the continuous use in transporting passengers and freight for hire, and otherwise carrying on the usual business of a railroad, with the usual appurtenances of such a road, and has received, during the period from the 6th day of November, 1875, to the 6th day of November, 1877, as avails of the traffic and business so carried on as aforesaid, an amount of money largely in excess of the cost of such transportation, and of all just and lawful expenditure in and for the operation of the said railroad during the said period, so that the net earnings of the claimant during the said period have amounted to a very large sum annually, to wit, to the sum of $7,500,000 annually.

And the defendants further aver that during each year of the
14 said last-mentioned period it became and was the duty of the claimant to pay to the defendants annually at the end of each year five per centum of the net earnings aforesaid of the said railroad for the year then next preceding, amounting in each year to a large sum of money, to wit, to the sum of $375,000, to be applied to the payment of the said bonds and interest as in the said act required; yet the claimant has wholly neglected and refused to pay to the defendants the amount of the five per centum aforesaid, due in each year, as aforesaid, or any part thereof, when the same became due as aforesaid, or at any time thereafter; and the said sums, amounting in the aggregate to $750,000, as aforesaid, are still due and unpaid.

Wherefore the defendants ask judgment for this their counter-claim of $750,000 against the claimant, or for so much thereof as they may be entitled to have in judgment after deducting the amount of any
15 recovery herein which the claimant may lawfully establish, and for such other and further relief as to the court may seem just.

THOMAS SIMONS,
Assistant Attorney-General.

III. *Traverse.—Filed April* 28, 1881.

And now comes the Attorney-General on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the said claimant

has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case pro-
16 vided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Asst. Attorney-General.

IV. *Amendment to petition.—Filed in open court, May* 11, 1881.

And now the complainant, by leave of the court, here amends its petition by striking out on the 4th page of said petition, after the words "sum of," the figures 1,161,720.25, and inserting in lieu thereof the figures 1,178,720.25, and by correcting the Exhibit A, annexed to said petition, so as to conform to the above amendment.

By S. BARTLETT, *its Attorney.*

17 *V. Findings of fact and conclusions of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

It was admitted upon the trial, and the court finds the fact to be, that the notice entitled Exhibit B, annexed to and forming part of the petition dated New York, September 1, 1876, was duly given by the claimant to the Postmaster-General.

II.

The case was submitted and heard on the following agreed statement of facts, which the court adopts and finds as its finding of facts:

United States Court of Claims.

THE UNION PACIFIC RAILROAD COMPANY
v.
THE UNITED STATES OF AMERICA. } Petition No. 12515.

It is hereby agreed that the above-entitled cause shall be submitted to the court for judgment upon the facts and stipulations that follow, viz:

I.

If the petitioner has a right to recover from the government for the transportation of mail agents and clerks, then the sum due the petitioner on account of the charge made therein for fares of postal clerks and agents during the period from February 1, 1876, to September 30, 1877, will be $140,000.

II.

That as to so much of the claim of the petitioner as relates to postal

services for the government, if the compensation for such services is not to be fixed by reference to the act of Congress approved July 1, 1862 (12 Statutes at Large, 489), especially section 6 of the same, and the subsequent acts amendatory thereof, but by the general laws regulating the compensation for similar service by railways, then the entire amount due the petitioner under its said petition for such services will be six hundred and eighteen thousand nine hundred and ten dollars and fifty-four cents ($618,910.54). (See Exhibit A, hereto attached.)

III.

That if the compensation to be paid petitioner for postal services as aforesaid is to be fixed by reference to the special acts of Congress, as distinguished from the general laws before named, and if the average rate charged by petitioner and paid by parties for the transportation of express matter, so called, is to be deemed "fair and reasonable rates of compensation," then such average rate, excluding from the computation the amount charged for cars containing fruit, fish, and perishable articles hauled in passenger trains, makes due the petitioner, under its
18 said petition, the sum of one million thirty-eight thousand five hundred and three dollars and twenty-five cents ($1,038,503.25) as the entire amount due for such services. (See Exhibit A, hereto attached.)

IV.

That if the amount charged upon cars transporting fruit, fish, and perishable articles hauled in passenger trains shall be included as express business, then the entire sum thus due the petitioner for transportation of the mails as aforesaid will be eight hundred and seventeen thousand seven hundred and ninety-nine dollars and twenty-five cents ($817,799.25). (See Exhibit A, hereto attached.)

V.

That if the amount charged upon cars transporting fruit, fish, and perishable articles hauled in passenger trains shall be considered the same kind of service as that performed for the government in transporting the mails, excluding from the computation the amount charged for all other express business, then the sum due the petitioner for the mail services aforesaid will be two hundred and thirty-two thousand two hundred and ninety-five dollars and twenty-five cents ($232,295.25).

VI.

Upon the preceding facts and those hereinafter stated the case is submitted to the court for its determination of the principles or rules applicable to the petitioner's right to recover upon its claim as set forth in stipulations 1, 2, 3, 4, and 5, respectively, aforesaid, and to enter such judgment therein, and upon the counter-claim of the United States, as the law requires.

The cars containing fruit, fish, and perishable articles are moved in the same trains as the cars containing mail and express matter. These cars are received from and delivered to connecting roads. Their contents need no handling or transfer, and there is no terminal expense except for switching the cars themselves. The cars are loaded to their

full capacity, averaging about ten tons each, and the contents require no special care in transit.

The cars containing the ordinary and regular express matter are furnished with a safe, and are fitted with sleeping and other accommodations for one messenger. The railroad company does its own express business. It collects and delivers express matter without extra charge, and is responsible for any loss or damage. One express messenger accompanies each car, unless on special business an additional messenger is detailed. The company maintains a special organization for conducting its express business, having express offices in all the larger towns, but generally the regular agent of the company attends to its express business.

The cars containing the mail are built and fitted up by the company upon plans prescribed by the Post-Office Department, and are furnished complete at the company's expense. Light, fuel, water, ice, &c., are also furnished by the company as required. Ten of these cars are used by the company, and are fitted up with all facilities for handling and distributing the mail as required by the Postmaster-General, and also with sleeping accommodations for postal employés.

The mail is received from and delivered to all post-offices on the route by the railroad company when the post-offices are within eighty rods of the railroad. The mail is also handled by station employés when it is received from and delivered to connecting lines, and this company pays its proportionate expense of the same. From one to five post-office employés travel on each postal car, who handle, distribute, and sort the mail on board the car. The Postmaster-General, in his discretion, imposes a fine upon the company for any delay or non-delivery of the mails.

In the above computation of sums due the company the weight is taken at fifteen thousand (15,000) pounds daily average, that being the quantity found by the Post-Office Department to have been carried daily for thirty consecutive days.

VII.

There is due the defendant upon its counter-claim, if the petitioner's claim of $1,038,503.25 for mail service is allowed by the court, seven hundred and three thousand and eleven $\frac{82}{100}$ dollars, as five per cent. upon the total net earnings of the claimant during the period specified in the counter-claim.

If the court shall award the petitioner its claim of $140,000 for transportation of mail agents and clerks, or any part thereof, the amount of the five per cent. above mentioned will be increased by five per centum on the additional amount so allowed.

If the court shall award the petitioner an amount for mail service less than the amount claimed therefor as above stated, the amount
19 of the five per centum of net earnings above mentioned will be reduced by deducting therefrom five per centum on the difference between the amount so claimed and the amount awarded by the court. (See Exhibit F, hereto attached.)

The exhibits marked A, B, C, D, E, and F, attached to these stipulations, may be referred to as forming part of the same [and as being computations correctly made up by the government, but what constitutes express matter is not to be affected by the classifications therein contained].

VII.

It having by stipulation I, above, been agreed between the parties that the sum of $140,000 is due to the petitioner for the transportation of mail agents and clerks if by law it is entitled to recover compensation for such service, and the government being desirous of an opportunity to correct the amount thus charged for said service, if upon further scrutiny it shall be deemed by it erroneous, it is agreed that if the government at any time before final judgment after appeal to the Supreme Court, if such appeal be taken, shall desire to correct said amount, their proposed corrections, unless assented to by the petitioner, shall be submitted to the Court of Claims.

Inasmuch as the foregoing stipulations do not embrace or cover any claim of the company for compensation per service over the Omaha bridge, and the approaches thereto, other than so far as the bridge is a part of the road, it is hereby agreed that any claim for additional or separate compensation is reserved to the claimant, and the right of neither party in respect thereof is in no way affected by said stipulation or by this suit.

SIDNEY BARTLETT,
Per SHELLABARGER & WILSON,
SHELLABARGER & WILSON,
Attorneys of Claimant.
THOMAS SIMMS,
Assistant Attorney-General.

APRIL 14, 1881.

EXHIBIT A.

Court of Claims.

UNION PACIFIC R. R. CO. *vs.* THE UNITED STATES OF A. } 11901.

Memorandum as to stipulations.

No. 1. Total amount of claim		$2,268,437 54
Less postal service stated in petition:		
Jan'y, 1876	$27,095 25	
Feb'y, March, 1876	99,462 50	
6 qrs. × $149,193.75	895,162 50	
		1,021,720 25
Difference, "other service"		$1,246,717 29
No. 2. Feb'y 1, 1876, to Sept. 30, 1877: 20 months, at $7,000 per month		$140,000

No. 3. Mail compensation as found by the Post-Office Department: (See Exhibit D.)

$39,310 62, Jan'y 1 to Feb'y 13, 1876, = 44 days, $315 per mile for 1,032.4 m., or per day, $893.55.

49,189 32, Feb'y 14 to M'ch 31, 1876, = 47 days, $369 per mile for 1,032.4 m., or per day, $1,046.58.

95,497 20, April 1 to June 30, 1876, = 1 qr., @ $381,988.80 per an. for 1,035.2 m., or $369 per mile.

347,930 72, July 1, '76, to June 30, 1877, 1 year, @ $336.10 per mile for 1,035.2 miles.

86,982 68, July 1 to Sept. 30, 1877, 1 qr., @ $336.10 per mile for 1,035.2 miles.

$618,910 54 = $45,144.43 (postal car sett. May 24, '80) + $573,766.11 (amounts found due per old settlements: 84,634.11 — 1st qr., 1876; 87,992.00 — 2d qr., 1876; 401,140.00 — 5 qrs. to Sept. 30, 1877).

20 No. 4. As per petition, Jan'y 1 to 31, 1876..... $27,095 25
As per item No. 207 on statement (Exhibit B)... 1,011,408 00

Total $1,038,503 25

No. 5. As per petition, Jan'y 1 to 31, 1876..... $27,095 25
As per item No. 33 in statement (Exhibit B)..... 790,704 00

Total $817,799 25

No. 6. As per petition Jan'y 1 to 31, 1876 ..... $27,095 25
As per item No. 30 in statement (Exhibit B)..... 205,200 00

Total $232,295 25

EXHIBIT B.

Analysis and comparison of express and mail business over the Union Pacific Railroad, from February 1st, 1876, to September 30th, 1877.

No.	Items.	Total.
1	Average daily weight actually carried through, not including "extra cars"	8,705 lbs.
2	Average daily weight actually carried through in "extra cars"	3,914 "
3	Totals Nos. 1 and 2	12,619 "
4	Average daily weight, reducing "way" to "through," not including "extra cars"	10,480 lbs.
5	Totals Nos. 2 and 4	14,394 "
6	Average daily weight of U. S. mails	15,000 lbs.
7	Company's express earnings	$707,016
8	Average express earnings, daily	1,162 85
9	Average rate per pound 1,035 miles	1109
10	Average rate per mile per annum	410 08
11	Extra car earnings	$53,550
12	Average extra earnings daily	88 07
13	Average rate per pound 1,035 miles	0225
14	Average rate per mile per annum	31 05
15	Earnings for express and freight on passenger trains	$760,566
16	Average express and freight earnings daily	1,250 93
17	Average rate per pound 1,035 miles	0869
18	Average rate per mile per annum	441 15
19	Company's charge for carrying U. S. mails	$994,625
20	Average daily charge	1,635 89
21	Average rate per pound 1,035 miles	109
22	Average rate per mile per annum	576 48
23	Amount allowed by Post-Office Department	$593,412 11
24	Average daily compensation allowed	976 07
25	Average rate per pound 1,035 miles	06507
26	Average rate per mile per annum	345 04
27	Mail compensation at express rates	$1,011,408
28	Average daily compensation	1,663 50
29	Average rate per mile per annum	586 64
30	Mail compensation at extra car rates	$205,200
31	Average daily compensation	337 50
32	Average per mile per annum	119 02
33	Mail compensation at combined express and freight rates	$790,704
34	Average daily compensation	1,300 50
35	Average rate per mile per annum	458 62
36	Excess of Co's charge over P. O. Dept. allowance	$401,212 89
37	" " express rates " company's charge	16,783
38	" " company's charge " extra car rates	789,425
39	" " " " combined express and extra car rates	203,921
40	" " express rates " P. O. Dept. allowance	417,995 89
41	" " " " extra car rates	806,208
42	" " P. O. Dept. " extra car rates	388,212 11

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EXHIBIT C.

Statement of extra cars of fish, fruit,' eggs, horses, &c.; daily average of weights, reducing way to through; actual weights of "through" express matter transported by Union Pacific Railroad Co's Express, during the period commencing February 1st, 1876, and ending September 30th, 1877.

Month.	Extra cars.	Daily average, reducing way to through.	Actual through weights, per month, not including extra cars.	Total earnings, including extra cars.
1876.		*Pounds.*	*Pounds.*	
Febr'y	0	10,392	263,005	$28,036 00
March	2	10,768	298,310	38,810 00
April	8	10,970	270,930	41,405 00
May	4	11,355	306,170	42,811 00
June	4	14,318	358,810	49,063 00
July	18	10,612	263,310	43,525 00
August	19	14,370	386,320	56,139 00
Sept.	6	13,398	339,020	43,842 00
Oct	9	11,993	316,560	44,044 00
Nov.	2	13,357	317,444	43,040 00
Dec.	10	12,044	314,340	42,203 00
1877.				
Jan'y.	0	7,761	201,760	26,820 00
Febr'y	0	8,177	186,600	23,719 00
March	2	8,141	236,948	32,242 00
April	1	9,484	243,320	31,118 00
May	1	7,208	174,220	30,374 00
June	0	7,768	173,450	31,554 00
July	19	7,290	166,310	37,360 00
August	11	8,200	191,007	35,611 00
Sept	3	11,997	284,690	38,850 00
Total	*119	209,603	5,292,524	$760,566 00
Average	3,914	10,480	8,705	$125 00

*2,380,000 pounds.

"Extra car" earnings = 119 cars, at $450 per car $53,550 00
Earnings of "express" proper 707,016 00

22 [J. K. Johnston, supt., Kansas City, Mo.; E. M. Morsman, gen'l supt., Omaha, Neb.; L. A. Fuller, supt., St. Louis, Mo. Union and Kansas Pacific Express, gen'l superintendent's office.]

OMAHA, NEB, *October 10th*, 1879.

Statement of extra cars of fish, fruit, eggs, horses, &c.; daily average of weights, reducing way to through; actual weight of "through" express matter transported by U. P. R. R. Co's Express during 1876, 1877, *and* 1878, *and total earnings of express department.*

Months.	1876.				1877.				1878.			
	Extra cars.	Daily average, reducing way to thro', lbs.	Actual thro' weights per mo., not including extra cars.	Total earnings, including extra cars.	Extra cars.	Daily average way, reduced to through.	Actual through weights per month, not including extra cars.	Total earnings, including extra cars.	Extra cars.	Daily average way, reduced to through.	Actual through weights per mo., not including extra cars.	Total earnings, including extra cars.
		Lbs.	*Lbs.*			*Lbs.*	*Lbs.*			*Lbs.*	*Lbs.*	
Jan	0	9, 207	240, 370	$29, 880 00	0	7, 761	201, 760	$26, 820 00	3	9, 010	191, 007	$39, 991 00
Feb	0	10, 392	263, 005	28, 036 00	0	8, 177	186, 600	23, 719 00	2	9, 689	224, 500	33, 577 00
Mar	2	10, 768	298, 310	38, 810 00	2	8, 141	236, 948	32, 242 00	10	10, 064	289, 200	39, 467 00
Ap'l	8	10, 970	270, 930	41, 405 00	1	9, 484	243, 320	31, 118 00	0	8, 820	219, 880	34, 090 00
May	4	11, 355	306, 170	42, 811 00	1	7, 208	174, 220	30, 374 00	6	8, 494	212, 360	41, 710 00
June	4	14, 318	358, 810	49, 063 00	0	7, 768	173, 450	31, 554 00	5	6, 419	134, 420	30, 157 00
July	18	10, 612	263, 300	43 525 00	19	7, 290	166, 310	37, 360 00	15	7, 378	133, 440	34, 064 00
Aug	19	14, 370	386, 320	56, 139 00	11	8, 200	191, 007	35, 611 00	13	8, 605	160, 750	35, 230 00
Sept	6	13, 398	339, 020	43, 842 00	3	11, 997	284, 690	38, 850 00	15	10, 334	215, 280	37, 865 00
Octo	9	11, 993	316, 560	44, 044 00	5	11, 228	282, 910	38, 598 00	21	12, 135	297, 070	48, 188 00
Nov	2	13, 357	317, 444	43, 040 00	5	10, 516	262, 410	36, 723 00	8	13, 400	302, 310	43, 188 00
Dec	10	12, 044	314, 340	42, 103 00	4	14, 240	379, 910	43, 768 00	15	16, 876	387, 640	52, 198 00

Daily averages do not include extra cars. Weights given include weights of gold & silver. Extra cars averaged about 20,000 lbs., and about $450.00 each, earnings.

Yours, respectfully,

(Signed) E. M. MARSMAN, *G. Supt.*

EXHIBIT D.

Memorandum as to Post-Office Department account with Union Pacific Railroad, from January 1st, 1876, *to September 30th,* 1877.

Date of orders.	Miles of road.	Amount allowed by Post-Office Department per mile per annum.					Total per annum.	Total paid.
		Mail transportation.	P. O. cars.	Total.	From—	To—		
June 22, '76	1032. 4	.....	.....	$315 00	Jan'y 1, 1876	Feb. 13, 1876	$325, 206 00	$39, 310 62
May 24, '80	1032. 4	$329 00	$40	$369 00	Feb'y 14, 1876	March 31, 1876	$389, 955 60	$49, 189 32
	1035. 2	$329 00	$40	$369 00	April 1. 1876	June 30, 1876	$381, 988 80	$95, 497 20
	1035. 2	$296 10	$40	$336 10	July 1, 1876	June 30, 1877	$347, 930 72	$347, 930 72
	1035. 2	$296 10	$40	$336 10	July. 1, 1877	Sept. 30, 1877	$347, 930 72	$86, 982 68
								$618, 910 54

OFFICE OF AUDITOR OF RAILROAD ACCOUNTS,
Washington, D. C., November 4th, 1880.

23 J. W. N.
In your reply please quote above initials. R. F. C.

OFFICE OF THE AUDITOR OF THE TREASURY,
FOR THE POST-OFFICE DEPARTMENT,
Washington, November 4, 1880.

SIR: In compliance with the request contained in your letter of the 3d inst., I have the honor to transmit herewith a statement showing the annual compensation of the Union Pacific R. R. Co. from January 1, 1876, to June 30, 1880.

Very respectfully,
(Signed) F. B. LILLEY,
Acting Auditor.

Hon. THEO. FRENCH,
Auditor of Railroad Accounts, Washington, D. C.

OFFICE OF THE AUDITOR OF THE TREASURY FOR THE
POST-OFFICE DEPARTMENT (PAY DIVISION),
Washington, November 4, 1880.

Memorandum as to Post Office Department account with Union Pacific Railroad Company.

Date of orders.	Weight of mails, lbs.	Miles of road.	Amount allowed by Post-Office Department per mile per annum.					Total per annum.
			Mail trans.	P. O. car.	Total.	From—	To—	
June 26, 1876	.....	1032. 4	.....	.....	$315	Jan'y 1, 1876	Feb'y 13, 1876	$325, 206 00
May 24, 1880	.....	1032. 4	$329	$40	369	Feb'y 14, '76	March 31, '76	389, 955 60
		1035. 2	329	40	369	April 1, '76	June 30, '76	381, 988 80
		1035. 2	296 10	40	336 10	July 1, 1876	June 30, 1878	347, 930 72
Nov. 12, 1878	.....	1035. 2	.....	.....	364 05	July 1, 1878	June 30, 1879	376, 864 56
		1035. 2	.....	.....	364 05	July 1, 1879	Oct. 19, 1879	376, 864 56
Jan'y 10, 1880	.....	1035. 2	324 05	50	374 05	Oct. 20, 1879	June 30, 1880	387, 216 56
June 22, 1880	.....	1035. 2	382 19	50	432 19	July 1, 1880	June 1, 1882	447, 403 38

F. B. LILLEY,
Acting Auditor.

EXHIBIT E.

STATE OF NEBRASKA,
County of Douglas, ss:

Joseph W. Gannett, being by me first duly sworn, deposes and says that he now is and for ten years last past has been the auditor of the Union Pacific Railroad (now Union Pacific Railway) Company; that as such officer he is familiar with its accounts during said period; that he is of the opinion that the mileage made by postal clerks traveling on said road from February, 1876, to October 1st, 1878, must have been about the same as since said last-named date, and that the amount due for the fares of said postal clerks for said period is about seven thousand dollars per month.

Deponent further saith that the reason and ground of said opinion

is this, namely: that from October 1st, 1878, to and including May, 1879, an accurate account of the amount due for mileage travelled by said clerks, with the following result, was kept:

October, 1878	$7,139 35
November, 1878	7,212 00
December, 1878	7,047 50
January, 1879	7,074 60
February, 1879	6,653 60
March, 1879	7,434 85
April, 1879	6,946 35
May, 1879	7,075 15

and that the number of trains run and postal clerks regularly travelling were the same during both periods, but that no account was kept of said mileage by the railroad company during the former period.

(Signed) JOSEPH W. GANNETT.

Subscribed in my presence and sworn to before me this 25th day of February, 1880.

[NOTARIAL SEAL.] (Signed) GEO. W. HALL,
Notary Public.

24 EXHIBIT F.

Statement of annual earnings, expenses, and net earnings of the Union Pacific Railroad Company for period commencing November 6, 1875, and ending November 5, 1877.

	Nov. 6, 1875, to Nov. 5, 1876.	Nov. 6, 1876 to Nov. 5, 1877.
EARNINGS.		
Commercial passenger	$4,067,138 02	$3,465,475 24
United States passenger	219,128 76	285,670 01
United States mail	532,639 66	596,775 00
Express	489,113 58	430,269 02
Commercial freight	6,071,706 10	6,441,286 39
United States freight	379,837 06	391,379 75
Company freight	677,476 48	765,035 80
Miscellaneous	191,764 00	257,174 61
Rent of buildings	24,178 37	22,874 49
Surplus in fuel and material account	46,492 82	47,370 78
Omaha bridge	480,479 09	458,741 75
Total earnings	13,179,953 94	13,162,052 84
EXPENSES.		
Car service	$19,703 63	16,370 51
Conducting transportation	866,936 41	867,558 83
Motive power	1,932,091 29	1,731,785 72
Maintenance of cars	444,726 54	442,058 95
Maintenance of way	1,753,507 85	1,615,619 33
General expenses	482,022 41	593,364 01
Omaha bridge	225,138 56	283,910 00
Legal expenses	52,015 80	.....
Salary account	21,431 67	.....
Government directors	2,745 25	.....
Expenses	17,484 94	.....
Construction expenses	8,825 00	170,555 41
Total expenses	5,926,629 35	5,721,222 76
Net earnings	7,353,324 59	7,440,830 08
Five per cent	367,666 23	372,041 50
For the period covered by the claim in this case the net earnings are as follows, viz:		
Nov. 6, 1875, to Nov. 5, 1876, as above	.....	$7,353,324 59
Nov. 6, 1876, to Sept. 30, 1877, 333/365 [333/365 of $7,440,830.08)	.....	6,706,911 75
Total net earnings for period	.....	$14,060,236 34
Five per cent	.....	703,011 82

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides as conclusions of law:

1. The claimant is entitled to recover only at the rate specified in Stipulation II of the agreed statement of facts.

2. The defendants are entitled to recover on their counter-claim in the proportion prescribed in Stipulation VII of the agreed statement of facts, $682,032.18.

3. The sum of $618,910.54 being found to have been earned by the claimant as set forth in Stipulation II, aforesaid, one-half part thereof should be applied to the payment of the bonds issued by the government in aid of the construction of the said road pursuant to the provisions of the act 2d July, 1864 (13 Stat. L., p. 356, § 5, chap. 216), and the remaining half part, to wit, the sum of $309,455.27, should be set off against and deducted from the amount found due from the claimant to the defendants, to wit, $682,032.18, and judgment be rendered against the claimant for the balance remaining, to wit, the sum of $372,576.91.

VI. *Opinion of the court.*

NOTT, J., delivered the opinion of the court:

Notwithstanding the magnitude of this case, and the ingenious ability with which it has been presented, the court is of the opinion that it turns upon a single point and that no substantial distinction lies between it and the cases of the Chicago, Milwaukee & Saint Paul Railroad (14 C. Cl's R., 125, 144, and the Chicago & Northwestern Railroad (15 id., 232, 245).

The learned counsel for the claimant contended upon the hearing that mail transportation services renderd by this company are to be measured by the rule laid down in the act of Congress which incorporated it; and that this railroad is a stranger to a subsequent statute which prescribes the terms upon which the Postmaster-General may contract with other railroads neither incorporated by Congress nor having rates expressly prescribed or provided for by law. He maintained that the Pacific Railroad act (12 Stat. L., p. 489, § 6, chap. 120), wherein it is declared that certain grants are made upon condition that the company shall, among other things, "transport mails" "for the government" "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," defines a compensation mutually agreed upon and fixed by contract in the act itself; and that the intent and meaning of the language, by a just construction, is that the compensation to be paid by the government shall be equal to the amount paid by private parties for the same kind of service. From these premises it is argued that the statute which made this specific agreement with this company for these services is not repealed or affected by the subsequent general legislation concerning rates (Rev. Stat., title 46, chap. 10) which authorizes the Postmaster-General to make other contracts with other companies not thus specifically legislated for by Congress.

We do not understand the act 1862 either to make a contract for all prospective services, or to bind the government to pay precisely the same rates which are paid by private parties for the same kind of service. Its language is:

"SECT. 6. And be it further enacted, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad, for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

Obviously and really, the section means, we think, that the company shall transport the government's mails, munitions, troops, &c., whenever required so to do, and that the government at all times shall have the preference over private parties; but that the transportation in all cases shall be done at fair and reasonable rates, which in no case (of preference or otherwise) shall exceed the rates paid by any private party for the same kind of service, while in all cases, even where the ordinary rates are fair and reasonable per se, the government shall have the benefit of those exceptional reductions of rate which railroads frequently make, sometimes as a matter of policy and sometimes as a matter of favor.

The case comes before us upon an agreed statement of facts, which in effect propounds certain questions for our determination, chief of which is, whether the rates charged for express cars on the Pacific railroads do not form the criterion of compensation for postal cars. It is contended that inasmuch as express cars come nearest in species of railway transportation to postal cars, they afford substantially "the same kind of service," and the rates paid therefor by private parties form the standard for the use and service of postal cars.

26 Construing the statute as we do, we think the court would not be limited, in an action where it was compelled to estimate damages, to the rates charged by the company to private parties for a single kind of similar service. We think that a court or jury would be authorized to look over the entire field of service in determining what was a fair and reasonable charge for a kind which was similar to, but not identical with, any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars, and the cost and running expenses no greater, we are inclined to think that that fact might be a proper element in the problem of estimating the amount of "fair and reasonable rates of compensation." The reports of the Auditor of Railroad Accounts show what rates of compensation the claimant has received for passenger cars, but in the determination of the case we do not feel at liberty to go outside of the agreed statement of facts upon which it was submitted.

At the time when the act 1862 was passed, the device known as the postal car system did not exist. But whether it existed or not, the provision before quoted in the act 1862 did not bind the government to send its mails over the claimant's road, and left Congress free to determine whether they should be so sent, and if so sent to prescribe conditions for their agent, the Postmaster-General. The subsequent provisions of law embodied in the Revised Statutes (chap. on railway service, §§ 3997, &c.) prescribe those conditions. We are not called upon to define the rights of the claimant or the liabilities of the gov-

ernment in the hypothetical case which may be suggested, of this road having refused to carry the mails according to the terms and conditions of those statutes, or of the Postmaster-General having sent only letter matter in ordinary cars over the road. But it is clear to our minds that if the Postmaster-General continued the use of postal cars upon the claimant's road, and if the claimant continued to run them for the convenience of the Post-Office, that service must be deemed voluntary, and upon the conditions prescribed by law.

In coming to this conclusion we have not overlooked the fact that on the 1st of September, 1876, the president of the company gave to the Postmaster-General clear and explicit notice that the claimant intended to charge the government express-car rates for the running of postal cars. Such a notice was eminently proper to put the Postmaster-General on his guard as to the future use of postal cars, and to negative the presumption that the claimant would thereafter continue to acquiesce in the existing rates. It was a good notice to save a cause of action, but was insufficient to create one. We have shown, or endeavored to show, in the case of the Chicago & Northwestern Railroad (15 C. Cl's. R., 245), that such a protest addressed by a railroad company to the Postmaster-General neither warranted him in transcending his authority as a public agent, nor operated to take the service thereafter performed out of the restrictive consent of the Revised Statutes.

The judgment of the court is that whereas the sum of $618,910.54 is found to be due to the claimant from the defendants for the services alleged in its petition, of which it is entitled to recover a moiety, to wit, the sum of $309,455.27, pursuant to the act 2d July, 1864 (13 Stat. L., p. 356, § 5, chap. 216), and whereas the sum of $682,032.18 is found to be due from the claimant to the defendants on the matters alleged in their plea of counter-claim, therefore the said moiety of $309,455.27 be set off against and deducted from the said sum found to be due to the defendants, and the defendants recover from the claimant the balance remaining, to wit, the sum $372,576.91.

27 VII. *Judgment of the court.*

At a Court of Claims held in the city of Washington, on the 31st day of May, A. D. 1881, judgment was ordered to be entered herein, as follows:

The court, upon due consideration of the premises, do order, adjudge, and decree, that whereas the sum of six hundred and eighteen thousand nine hundred and ten $\frac{54}{100}$ dollars ($618,910.54) has been found to be due to the claimant from the defendants for the services alleged in its petition of which it is entitled to recover a moiety, to wit, the sum of three hundred and nine thousand four hundred and fifty-five $\frac{27}{100}$ dollars ($309,455.27) pursuant to the act 2nd July, 1864, (13 Stat. L., p. 356, § 5, chap. 216), and whereas the sum of six hundred and eighty-two thousand and thirty-two $\frac{18}{100}$ dollars ($682,032.18) has been found to
28 be due from the claimant to the defendants on the matters alleged in their plea of counter-claim, therefore the said moiety of three hundred and nine thousand four hundred and fifty-five $\frac{27}{100}$ dollars ($309,455.27) be set off against and deducted from the said sum found to be due the defendants, and the defendants recover from the claimant, the said Union Pacific Railroad Company, the balance remaining, to wit, the sum of three hundred and seventy-two thousand five hundred and seventy-six $\frac{91}{100}$ dollars ($372,576.91).

29 VIII. *Application of claimant for and allowance of appeal.*

And now comes the claimant in the above action, and prays an appeal from the judgment of the court therein rendered, on the 31st day of May, A. D. 1881, to the Supreme Court of the United States.

SHELLABARGER AND WILSON,
Att'ys for Claimant.

Filed June 1, 1881.

AT CHAMBERS, *June* 1, 1881.

Allowed:

C. D. DRAKE,
Chief Justice.

30 In the Court of Claims.

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES. } No. 12515.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this twenty-fifth day of June, A. D. 1881.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 860. The Union Pacific Railroad Company, appellant, vs. The United States Court of Claims. Filed 11 July, 1881.

SUPREME COURT U. S.
FILED
JAN 18 1882
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1881.

NO. 860.

THE UNION PACIFIC RAILROAD CO., *Appellant*,

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

The appellant seeks to recover from the Government compensation for two classes of service, extending from January, 1876, to September 30, 1877; namely, for the transportation of the mails for the United States, and also of employees accompanying the mails, and charged with the sorting, distribution, and delivery of the same. The rate which is to govern this compensation, it avers, is fixed and defined by the following section of its charter: —

"SEC. 6. *And be it further enacted*, That the grants "aforesaid are made upon condition that said Company "shall pay said bonds at maturity; and shall keep said "railroad and telegraph line in repair and use; and "shall at all times transmit dispatches over said tele- "graph line, and transport mails, troops, and munitions "of war, supplies and public stores, upon said railroad, "for the Government, whenever required to do so by "any department thereof; and that the Government "shall at all times have the preference in the use of "the same for all the purposes aforesaid (at fair and

"reasonable rates of compensation, not to exceed the "amounts paid by private parties for the same kind "of service); and all compensation for services ren- "dered for the Government shall be applied to the "payment of said bonds and interest until the whole "amount is fully paid. Said Company may also pay "the United States, wholly or in part, in the same or "other bonds, treasury notes, or other evidences of "debt against the United States, to be allowed at par; "and after said road is completed, until said bonds and "interest are paid, *at least five per centum of the net "earnings of said road shall also be annually applied "to the payment thereof.*" (12 Statutes at Large, chap. 120, p. 489.)

This provision, it contends, withdraws the question of rate of compensation from the general regulations, under which Congress has subjected the rates of compensation to be allowed the numerous State railway companies of the country to arbitrary maximums fixed by it, and changed from year to year at its discretion.

I.

The general question of the cause is, Does the above section constitute a contract between the Government and the appellant, applicable to the use of the road by the former; and further, does it furnish the rule by which the rate of compensation for such service is to be fixed?

The learned Court of Claims, after having, in a previous portion of its judgment, seemingly declared that "obviously and really" the section contains a contract fixing the rule or measure of compensation (Record, p. 18), comes to this ultimate conclusion: "The Act "of 1862 did not bind the Government to send its "mails over the claimants' road, and left Congress free "to determine whether they should be sent, *and, if so "sent, to prescribe conditions* for their agent, the Post- "master-General. The subsequent provisions of law,

"embodied in the Revised Statutes (chapter on railway "service, section 3997, &c.), prescribe those conditions" (Record, p. 18).

The effect of this judgment of the learned Court is simply to declare that, notwithstanding the Act of 1862 (appellant's charter), Government is at liberty to employ the Company or not; and that, although that Act fixes the measure of compensation when thus employed, yet Government is at liberty, as a condition of such employment, to prescribe a different measure of compensation; and that Revised Statutes (section 3997, &c.), in effect rendered inapplicable the charter of appellant, and constituted new conditions, upon which the employment of the Company was in future to depend. Now the facts to which this doctrine was applied stand thus: The appellant gave the Government notice in writing that it could not longer assent to the past rates of remuneration fixed by the Department, but would charge for the service, as a fair compensation, monthly rates determined by the weight of the mails (Record, p. 5, Exhibit B). The Department, relying on the legal position thus affirmed by the Court of Claims, without any arrangement continued to use the road for the period covered by the claim now made, as to which no payments or adjustments have been made. Thus there was left by both parties the contested question of legal construction to be judicially determined; and the two leading points for discussion are, —

1. Is the construction of appellant's charter, adopted by the learned Court of Claims, the true one; namely, that by it the Government, instead of employing the road of the Company whensoever the public convenience or necessity required such use, upon the terms prescribed by that charter, was, by the Act, left at liberty, as a condition of affording any such employment, to prescribe new and different terms at its pleasure?

2. If such be not the just and true construction of the Act, — if its purpose was that, whensoever the

road of the Company should be thus used, it should be upon the terms prescribed by that Act, then the remaining question will be, Has the compensation claimed for such use during the period embraced in the petition (while each party was insisting on its own construction of the charter) been shown, upon the facts presented by the stipulation filed in the case, to be in accordance with the provisions of the Act, and, if not, then what, upon those facts, is the true measure and quantum of compensation?

II.

This construction of the Act of 1862, adopted by the Court of Claims, involves two separate propositions; namely, not only that the Act left the Government at liberty to impose, as a condition of future employment of the road, new terms as to the measure of compensation, but further that, in the exercise of that right, Congress, by the Act of June 8, 1872 (embodied in section 3997 *et seq.* of the Revised Statutes), has undertaken to "prescribe those conditions," which conditions are applicable to the appellant's charter.

1. As to the first of these propositions, although literally construed the Act of 1862 may impose no obligation on the Government to use the road of the appellant notwithstanding its stipulation for priority in such use, and although, as has been declared by this Court, that one of the motives and policy on which the Act was founded was to obtain that use, yet to hold that when thus used the Act contains no obligatory contract as to the compensation for that use, would seem impossible. How utterly useless and meaningless would be the insertion of guarded provisions for compensation for the use of the road, if, by the true construction of the Act, Government was at liberty, at any time, to prescribe such terms of compensation as it might choose as conditions of future employment!

2. But we submit that there is no just foundation for the remaining proposition of the Court of Claims;

namely, that by the subsequent legislation referred to, Congress has preseribed as applicable to the appellant's charter new conditions as to the measure of compensation,—conditions inconsistent with the provisions of the charter.

This depends on the history of legislation in regard to compensation to be paid by Government to railways for transportation of the mails, &c. That history, we submit, shows that it has been the purpose of Congress to discriminate in its legislation between the conditions or terms required of the various State corporations to whom land grants have been made by the Government, and the public enterprise created and shaped by the charter of the appellant; and further that, in view of this fact and of the express provisions as to compensation contained in that charter, by no just construction can the legislation relied on by the Court of Claims be held to be applicable to other than State corporations on whom Government has bestowed such land grant.

From July 7, 1838 (5 Stat. at Large, chap. 172, sec. 2, p. 283), down to Sept. 20, 1850 (9 Stat. at Large, chap. 61, sec. 6, p. 467), the legislation of Congress had regard only to the transportation of the mails over railways established in the various States to which no Government grants or subsidies had been made; and it merely enabled the Postmaster-General to contract for the service if terms could be made with the corporations, and, if not, to resort to the previous methods of transportation. In 1850 (by the statute last cited), the first land grant, as it is believed, was made by Congress to a railway, a State corporation; and the grant was accompanied by a condition that the "United States mail "shall at all times be transported on said railroad, "under the direction of the Post-office Department, "at such prices as the Congress may by law direct." This was followed by similar grants to such corporations, coupled with the same condition (see Act of 1853, 10 Stat. at Large, chap. 59, sec. 6, p. 156).

Up to June 8, 1872 (17 Stat. at Large, chap. 289, sec. 214, p. 309), no provision had been made that,

until Congress fixed the rates of compensation, the same might be fixed by the Postmaster-General.

Next, after the various Acts making land grants to railways upon the above conditions, came the appellant's charter (the Act of 1862), by which (as it is to be presumed, with a full view of the mode in which Congress had dealt with the subject of compensation to previous land-grant railways, and had made that compensation dependent at all times upon the legislation of Congress) the provisions were notably changed, and, as to appellant, Congress declared that, instead of being subject to future legislation, it should be paid "fair and reasonable rates of compensation" for the service.

Clear and distinct, then, as was this departure from its previous terms and policy, it is perhaps unnecessary to inquire into the surrounding circumstances which furnish the reason for that departure. But, since they are embodied in the judicial records of this Court, and of the Court of Claims, it may not be useless to refer to them.

These reasons are perhaps stated with greater fulness by this Court in United States *vs.* The Union Pacific Railroad Company, 1 Otto, pp. 79–80, where the necessities and policy of the Government to procure, by novel and favorable terms, the construction of this great road, are thus stated: —

"The Act itself was an experiment. It must be "considered in the nature of a proposal to enterprising "men engaged in the work; for, with the untried obsta- "cles in the way, there was no certainty that capital "could be enlisted. If enlisted at all, it *could only be* "*on conditions which would ensure, in case of success,* "*remuneration proportionate to the risk incurred.*" The same views may in substance be found on p. 579, vol. 10, Court of Claims Reports.

Incidentally, this Court has expressed its views on the construction of the section in question thus: "The "Company is bound, of course, to perform the service

"stipulated for by the sixth section of the Act of 1862, "*being paid therefor at the rates therein prescribed.*"

United States *vs.* Denver Pacific Co., 9 Otto, p. 462.

If the above view of the discrimination made by Congress in the charter of the appellant as compensation for its use, as distinguished from provisions accompanying grants of land to State railway companies, be correct, the inquiry then is, Can the subsequent legislation relied on (repugnant as it would be to the contract contained in appellant's charter) be held to be applicable to appellant, or solely to the land-grant railroads, with the terms of which grant such legislation is in no way in conflict?

The Act of June 5, 1872 (17 Stat. at Large, p. 283), contains, we think, the earliest provisions which, by any possible construction, could be set up as affecting the appellant (sec. 14, p. 399), and is as follows: "All "railway companies to which the United States have "furnished aid by grant of lands, right of way, or other- "wise, shall carry the mail at such prices as Congress "may by law provide; and, until such price is fixed "by law, the Postmaster-General may fix the rate of "compensation."

This Act purports to be "An Act to revise, consoli- "date, and amend the Statutes relating to the Post- "office Department." In doing this, it gathers up and engrafts the provisions before referred to in the Acts making grants of lands to State corporations in precise terms (which provisions had not before been inserted in the various Acts regulating the Department), and it makes this addition; namely, that, until Congress shall prescribe rates of compensation, they shall be fixed by the Postmaster-General.

Now, since the provisions of this Act will be satisfied by applying them to previous land-grant roads (even if upon no other grounds), they cannot be held to apply to or affect the distinct provisions of the appellant's charter.

III.

Since it may possibly be suggested on the part of the Government, either that the provisions of appellant's charter on the subject of compensation have been repealed in exercise of the power reserved therein to the Government, or that by temporary acquiescence up to September 1, 1876, in rates prescribed by the Department for railways generally, appellant's claim cannot now be maintained, we add a few words upon each of these topics.

1. As to repeal: The doctrine of this Court, from Ward *vs.* United States (16 Peters, 362), has uniformly been that there must be positive repugnance between the provisions of the new law and the old to work the repeal of the latter by implication, and, as already stated, there is no legislation of Congress which can be referred to that constitutes such repugnance, the point need not be further discussed.

2. As to the fact of supposed acquiescence: Up to September 1, 1876, the Post-office Department treated the appellant's road as simply one of the land-grant railways to which it might, by the terms of their grants, prescribe rates of conpensation. Now, appellant, for the time being, having on its hands — as the records of the Court show — various large and important controversies with the Government, and because the rates prescribed, looking to the then moderate amount of Government transportation, might be deemed an approximation to fair and reasonable rates, acquiesced in the same; but during the seven years up to September, 1876, the service had increased in magnitude to such extent that the rates prescribed for land-grant railways generally, by the Post-office Department, were no longer "fair and reasonable rates of compensation," and appellant addressed to the Department the following letter: —

"NEW YORK, September 1, 1876.

"Hon. J. N. TYNER,
Postmaster-General.

"SIR, — By a recent weighing of the mails transported by the Company for your Department, made in February last, the average daily weight for a period of thirty consecutive days was fifteen thousand pounds.

"Under contract with the Government (see section 6 of the Act of 1862), we are required to perform this service at rates of compensation not to exceed the amount to be paid by private parties for the same kind of service.

"The transportation of express matter is performed on the same trains, — viz., passenger trains, — and is assumed to be the same kind of service. We have accordingly had a careful computation made of the compensation received for express service; and computing the mail service on the basis indicated, gives the annual sum of $596,775, or $49,731$\frac{25}{100}$ per month.

"Dating from February 1st, 1876, we shall charge the Government this sum monthly for mail transportation, in addition to the fares of such employees and mail agents as the Government shall send on our trains.

"The Company believe the Postmaster-General will concede the correctness of the rule we have adopted as to similar kinds of service, inasmuch as the large increase of mail transportation — the increase having been from 6,000 pounds in 1870 to 10,500 pounds in 1874, and to 15,000 pounds in 1876 — is drawn largely from the transportation of gold coin and other express matter, which was formerly done by the Express Department of the Company, and is now largely sent by mail in sealed packages. The weight as ascertained at the last weighing will be assumed as the daily amount transported, until the Government or the Railroad Company request a re-weighing.

"We assume this is very fair towards the Government, inasmuch as the mail matter is constantly increasing, as the figures we have alluded to show. The compensation we now propose to charge is less than that allowed us from 1870 to 1874.

"Very respectfully,

(Record, p. 5.) "SIDNEY DILLON, *Pres't.*"

In this attitude of things, and holding its rights by contract, it would seem impossible to hold that such acquiescence precluded the appellant at any time from refusing to be in the future and longer contented with rates fixed by the Department as being, under the altered circumstances or otherwise, fair and reasonable rates, and so to preclude the defendant from notifying the Government that the rates hereafter must be determined under the provisions of its contract.

The learned Court of Claims seems to hold (Record, p. 19) that such notice was without efficacy, because the Postmaster-General would not thereby be warranted to depart from the general legislation of Congress fixing the manner of compensation to be allowed railways, and regulating contracts to be made by him with them. But this goes upon the ground that appellant's road is simply one of the land-grant railways to which such legislation is applicable, and that its charter does not constitute a contract of the Government with appellant as to rates, — a ground which, it is needless to repeat, is throughout denied by the appellant. And, if the charter does constitute a contract, then nothing remains for the Postmaster-General but to settle, from time to time, with appellant, what constitutes "fair and reasonable rates of compensation," and to allow the same accordingly.

IV.

If it shall have been shown that the Act of 1862 reserves no power to the Government to fix, at its pleasure, the rates of compensation for the use of appellant's road, and farther that, if it had such power, it has by no legislation attempted to exercise it, it is important, before adverting to the proofs upon which appellant's claim rests, to draw attention to a feature of the Act, — namely, that it prescribes and limits the sources from which the proof of what shall be deemed fair and reasonable rates is to be derived, — namely, *the rates adopted by the road itself in transacting its business with*

the public generally; and so it adds "not to exceed the "amounts paid by private parties for the *same kind* of "service."

But for this provision, it might have been contended that fair and reasonable rates of compensation should be determined by the cost of the road and its operations, with a just allowance to the Company for net profits on the same; or it might be claimed that reference should be had to the rates fixed by one or more of the railways of the country (if such could be found) which, in cost of construction and operation, length of line, and other features, was similar to the road of the appellant. Probably to avoid a resort by appellant to such complex and doubtful modes of fixing rates for compensation, the words above quoted, making the charges of the appellant itself to others the standard, were inserted.

We proceed, next, to present the principles and proofs upon which the claim of the appellant, as stated in detail in its petition, is rested, and this requires a more extended discussion.

1st. *All the evidence is matter of stipulation*, each party having inserted in such stipulations all the facts deemed by it material, or bearing upon the issue; *and all the stipulations of both parties proceed upon the conceded ground that, if the statute constitutes a contract with appellant, as contended by it, then the standard of compensation is to be fixed in reference to the rates paid to the corporation in its dealings with the public.*

We reproduce the clause of the sixth section to which the evidence is to be applied, as follows: —

"At fair and reasonable rates of compensation, not "to exceed the amounts paid by private parties for the "same kind of service."

As has been stated already, the agreed standard is the compensation paid to it by other parties, and not that received for similar service by other companies, nor one founded upon a just profit to the corporation itself. This standard the section declares shall not be transcended.

The absolute basis, then, is to be "fair and reasonable "rates of compensation." *The qualification of that basis* (probably to avoid all claim for special circumstances) is that such "fair and reasonable rates" shall not exceed those paid by private parties.

Now, the words "fair and reasonable rates of compensation," if to be determined by the course of dealing of the Company with the public, are convertible terms with "the amounts paid by private parties for the same kind of service." How else are "fair and reasonable rates" to be determined, except by ascertaining what the road receives of the public for the same service?

We submit, therefore, that, taking the terms "fair and reasonable rates of compensation" alone by themselves, appellant is entitled to claim of the Government the rates it receives from others.

2d. Next, what effect has the qualification that such compensation shall not exceed that paid by private parties for the same kind of service? *Does it import that appellant shall be paid less than "fair and reasonable rates,"* or are the words "not to exceed" to be construed as meaning rates equal to those paid by private parties? To say that, by the use of these words, the Government intended that it should pay less than private parties, would seem absurd. The words at the close of the same section, which require payment by the appellant to the Government of *at least* five per centum of its net earnings, have been construed by this Court and the Court of Claims as meaning equal to five per cent; and there is no reason on the face of this contract why the words "not to exceed" should not receive the same construction.

3d. Assuming it, then, to be true that, in fair construction, the Government has provided that its transportation shall not be less than "fair and reasonable rates," and be such as are charged to the general public, the question, upon the facts contained in the stipulations, is: —

What constitutes the same *kind* of service, and what were the rates paid by the public for such service?

The services contemplated by the section were telegraph service, the transport of troops, munitions of war, supplies and public stores, and of the mails. The rates for each of these services, except the mail, being identical with those daily performed for the public, present no difficulty; but the service of transporting the mails is not *absolutely identical* with any other service, and this was of course known to the framers of the Act. The words of the Act are not "the same service," but "the same *kind* of service."

It being known, then, to Congress, that there was no service identical with that of the transportation of the mails, we submit that the kind of service most nearly identical in its leading features — namely, the cost to the Company, and the regularity, frequency, and rapidity of transit — must be deemed, within the intent of Congress, as the same kind of service; and it will be found that these conditions are amply fulfilled by the features of the express business of the Company for the general public. Indeed, there would seem (from the facts presented by the stipulations as being the only facts desired by either party to constitute the evidence in the cause) to be no other standard, unless, indeed, the Court should be required to investigate the different incidents, character, and rates attending the transport of the different classes of freight, as set forth in the stipulations; and then to find if there be not in some of them (other than the express business) features more or less resembling those attending the transport of the mails, and, by the best exercise of its judicial faculites, fix upon an average based upon the existence and number of such similarities. It is submitted that the term, "same kind of service," excludes all averages.

It should be added that, if the foregoing views are

sound and just, then, by agreement contained in the third stipulation (Record, p. 9), the amount due the appellant is fixed.

4th. We have stated that the express service of the Company, in its cost, regularity and frequency, and rapidity of transport, is most nearly identical with that attending the transport of the mails; *but, in the matter of cost*, the transport of the mails, under the requirements of the Post-office Department, will be found to be largely in excess of that attending the express business. To justify this assertion, an analysis of the facts contained in the stipulation must be had; and, as to the cost, labor, equipments, and all the incidents attending the transportation of the mail itself (excluding the sums fairly payable for the transportation of postal clerks), they will be found to be as follows: "The "cars containing the mail are built and fitted by the "Company, upon the plans prescribed by the Post-office "Department, and are furnished complete at the Com- "pany's expense. Light, fuel, water, ice, &c., are "furnished by the Company as required. Ten of these "cars are used by the Company, and are fitted up with "all facilities for handling and distributing the mails "as required by the Postmaster-General, and also with "sleeping accommodations for postal employees. The "mail is received from and delivered to all post offices "on the route by the Railroad Company when the post "offices are within eighty rods of the railroad; the mail "is also handled by station employees when it is re- "ceived from and delivered to connecting lines, and the "Company pays its proportionate expense of the same. "The Postmaster-General, in his discretion, imposes a "fine upon the Company for any delay or non-delivery "of the mail" (Record, p. 10).

Such is the mail service,— the standard with which is to be compared the character, cost, and incidents attending all other classes of service performed by the

Company for "private parties," in order to find which of these latter classes of service most nearly approaches "the same kind of service" as that rendered the Government in the transportation of the mails.

5th. It is next to be noted that the stipulation, by agreement, shows there are but two classes of transportation service performed by the Company for "private parties" (excluding common freight); namely, "cars "containing fruit, fish, and perishable articles, — cars "containing the ordinary and regular express matter." These alone, therefore, have any bearing on the question to be decided.

The first inquiry then is, What do the agreed facts, as set out in the stipulation, show to be the respective cost, character, and incidents of the transportation by the Company of these two last-named classes? They show that they are both "moved by the same trains as the cars containing the mails" (Record, p. 9), and also the following details of the cost, character, and incidents of express service: "The cars containing the ordinary "and regular express matter are furnished with a safe, "and are fitted with sleeping accommodations for one "messenger. The Railroad Company does its own ex- "press business. It collects and receives express mat- "ter without extra charge, and is responsible for any "loss or damage. One express messenger accompanies "each car, unless, on special business, an additional "messenger is detailed. The Company maintains a "special organization for conducting its express busi- "ness, having express offices in all the larger towns; "but generally the regular agent of the Company at- "tends to its business" (Record, p. 10).

Without, for the present, analyzing in detail and comparing the features of the two classes, — namely, mail and express service, — to find how nearly they constitute the "same kind of service," it is necessary first to advert to the other class of service for "private

parties," set out in the agreed facts, in order to find whether that class may not be more nearly identical, or approach in character the service rendered in the transportation of the mails.

That service is the transportation of "cars containing "fruit, fish, and perishable articles;" and the agreed facts in regard to the same are as follows:—

"The cars containing fruit, fish, and perishable "articles are moved in the same trains as the cars con- "taining mail and express matter. These cars are "received from and delivered to connecting roads. "Their contents need no handling or transfer; there is "no terminal expense, except switching the cars them- "selves. The cars are loaded to their full capacity, "averaging about ten tons each; and the contents re- "quire no special care in transit" (Record, p. 9).

Now, collating the features and incidents connected with each of these classes of transportation, it is obvious, we repeat, —

6th. That the *cost*, as well as the extent and the character, of service imposed on the Company as necessary incidents to each class of such service, forms one of the most essential elements in determining whether they, and which of them, are the "same kind of service" within the meaning of the Act.

The Government, in the transportation of the mails, as has been seen, requires a class of special, large, and expensive outlays and service in no way incident to the transportation of express matter or of common freight; and it would be most unjust to hold that it was its purpose, or that of the appellant, to provide that coarse freight, requiring no such extraordinary expenditures or care, should, for the purposes of the contract, be deemed the "same kind of service," merely because it was transported by the same trains; and yet this is the only feature which the transportation of "fruit, fish, and perishable articles" has in common with those attending the transportation of the mails.

Indeed, we think it to be a fair and just interpretation to say, that, contemplating and thus describing, as the Act must be deemed to do, the heavy expenditures established by the Department *as necessary for the safe and proper transmission of the mails*, its purpose was to compensate the Company to the extent of its largest rates for transportation (with the same frequency and rapidity), since it must have been obvious that such transportation of the mails could not but be attended with equal, or indeed larger, expense to the Company than that of its highest-paid service. If it be said, in answer to this suggestion, that it is not to be assumed that Congres foresaw the extent of these expenditures, the answer is, that all peculiar expenditures required for the safe and convenient transport of the mails, although their extent was not ascertained, must be deemed to have been contemplated by the Act, and also that such expenditures would not be requisite or attached to any service performed by the Company for the public.

7th. Again, assuming it to be true that by the "same kind of service" was intended a single class of service most nearly approaching in all respects that attending the transport and delivery of the mails; and assuming that it was not to be merely one resembling such service in the single feature of the same rapidity of transit, nor yet an artificial standard made up by grouping together all classes of service in which there should be found any one element attending the transportation of the mails (and then taking the aggregate rates of compensation of all as fixing the compensation of the Company), — let us see first what characteristics attend the transport of the cars of fish, fruit, and perishable articles compared with those connected with the transport of the mails, in order that we may find if the two can, by any fair construction, be deemed the "same kind of service." Both, it is agreed, were transported by the

parties," set out in the agreed facts, in order to find whether that class may not be more nearly identical, or approach in character the service rendered in the transportation of the mails.

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same trains; but, for the one, constant and daily preparation and regularity is requisite. The other, as is shown by the schedules, is a small, irregular, infrequent service, which may be intermitted or postponed according to the necessities of the Company. The one requires no handling, no accompanying employees, no terminal expense; the other, as is shown, involves large expenditures for each of these purposes. The one consists of cars loaded to their full capacity (about ten tons each); and obviously, from the bulk and character of the articles, low rates of freight are required to obtain the business. The other may leave cars more or less empty, and incapable of being utilized by the Company. Add to this the large expense in constructing special cars for the one and the use of common cars for the other, and the contrast is complete.

8th. As the facts in the stipulation show that beside the mail service there are but two other classes of service with which the mail service can be compared — having shown the dissimilarity of one of them, namely, the service in the transport of fish, fruit, and perishable articles — to that of mail service, it remains next to find what the other — namely, express service — *has in common* with that of transporting the mails, and this requires but little detail.

The frequency and rapidity of transport are common to both, if it be assumed that express matter is to be always found on the rapid trains which transport the mail. The cost of special cars and the equipment for mail service far transcends that required for the express service. The occurrence of partly filled cars may or may not be identical, depending upon the fact whether the Company would allow other than express matter to be placed in the same cars, — a concession which we assume would not be permitted in the mail service. The safe and the fitting-up of the cars with sleeping accommodations are common to both, except that

the extent of those accommodations in mail cars far exceeds that of the express service. The expenditures in guarding, delivering, and receiving the mail, and those of the Company in relation to express matter, may not be identical, but are of the same general character; *and the leading feature common to both is the concentrated values of matter transported within a narrower compass than belongs to the usual transport of freight.*

V.

There is inserted in the stipulation the fact (or rather the law) that, the Company, in transport for private parties, is "liable for loss or damage" (Record, p. 10), and this doubtless on the assumed view that such liability does not attach to the transport of the mails, and thus to defeat, not the similarity of the service itself, but to lessen the rates to be allowed to the Company. Without discussing the question whether, for wilful destruction of the mails, or gross negligence of the Company resulting in the loss of the same, the Company would be legally liable either to the Government or to the parties injured, we submit that when Congress fixed, as a standard of compensation, the rates for the "same kind of service," it referred to cost, characteristics, and methods by which the service was to be performed, and that it did not intend to embrace, by those terms, the comparative risks of the Company that might be incurred by accidents or misconduct or frauds of its employees or strangers. Had the design been that this element should enter into the meaning of service of the "*same kind*," it would have been expressly provided.

By reference to the notice given to the Department, before referred to (Exhibit "B," Record, p. 5), and to the specifications to appellant's claim (Exhibit "A,"

Record, p. 4), it will be seen that the claim for the transportation of the mail *is based upon its weight*, and the rates fixed in reference to the standard of express matter. The third stipulation admits the amount and correctness of the claim, if that standard is a just one.

It will be observed that, in making its claim, appellant has not attempted, in conformity to a doctrine stated in certain cases decided by the Court of Claims, and referred to in its judgment in this case (14 Ct. of Claims, p. 125; 15 do. p. 232), to make the cost of postal-cars, and the other incidental expenditures required by the Department, a separate claim from that for the transport of the mails, and thus adopt the view of the Court of Claims that such expenditures form no part of its duty to transport the mails. These expenditures have been required by the Government, of the Company, as being imposed upon it by the just construction of its charter, and could be required upon no other ground; the evidence shows no separate contract on the subject. The Company has acquiesced in the construction of the Government, and made the expenditures; and it ought not now, upon the ground taken by the Court of Claims, to be compelled to amend, and make such expenditures the subject of a separate claim.

VI.

But the notice to the Government above referred to, and the specifications of appellant, do present another claim, which it is now necessary to consider; namely, the claim for transport of the postal employees of the Government.

Stipulation number one (Record, p. 8) fixes the amount due for the service, if by law such charge can be made.

It is clear, looking to the sixth section of the Act of 1862, that no such service is in terms contemplated or required by the Act; but, if it can be deemed a just incident of the transport of the mails, then, since appellant's specification of the claim for transporting the mails is *confined to the weight of those mails*, and does not embrace the service of transporting employees, appellant will be in that case entitled to add the amount due for that service, so as to form part of its just claims for transporting the mails, and no amendment is necessary to formally consolidate the claims.

S. BARTLETT,

For Appellant.

93-h 5-p 342

FILED
JAN 23 1882
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNION PACIFIC RAILROAD Company
vs.
THE UNITED STATES.
No. 860.

BRIEF FOR THE UNITED STATES.

This was a claim to recover for the transportation of mail agents and for postal service, from February 1, 1876, to September 30, 1877.

A counter claim was put in for 5 per cent. upon net earnings for two years, November, 1875, to November, 1877.

The government adopts as its brief and argument the satisfactory opinion of the learned court below. (Record, pp. 17, &c.)

S. F. PHILLIPS,
Solicitor-General.

SUPREME COURT OF THE UNITED STATES.

No. 178.

ANDREW J. DAVIS AND CHARLES L. CLARK, PLAINTIFFS IN ERROR,

vs.

SARAH J. FREDERICKS AND WELLINGTON A. FREDERICKS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 In the district court, 1st judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
CHARLES L. CLARK, SHERIFF, &C., DEFENDANT. } 132.

AND

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants. } 166.

Be it remembered that the said Sarah J. Fredericks having filed her amended complaint in this court against the above named defendant, Charles L. Clark, sheriff, &c., which said complaint is in words and figures following:

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, WITH WHOM IS ASSOciated Wellington A. Frederick', her husband, as plaintiffss, plaintiffs.
versus
2 CHARLES L. CLARK AND ANDREW J. Davis, defendants.

The plaintiff Sarah J. Fredericks, for amended complaint herein, by leave of the court first had and obtained, state':

1st. That on the 8th day of March, A. D. 1875, she was, and for a long time previous thereto she had been, and now is, a married woman and the wife of Wellington A. Fredericks, her coplaintiff above named.

2. That on the 8th day of March, A. D. 1875, at the county of Gallatin and Territory of Montana, this plaintiff, Sarah J. Fredericks, was the sole and exclusive owner and possessor in her own right as sole trader of the following goods and chattels, to wit, two hundred and eighty-two sacks "XXX" (triple X) flour of the Willow Creek flouring mills make and brand, and one hundred and seven bushels of wheat and five hundred feet of pine lumber. That said flour and wheat was of the value of two thousand two hundred dollars, and said lumber of the value of thirteen ($13.00) dollars.

3. That the defendants, on the 8th day of March, A. D. 1875, while this plaintiff was the sole and exclusive owner of said property,
3 at the said county of Gallatin and Territory of Montana, without this plaintiff's consent, did wrongfully and unlawfully take said goods and chattels from the possession of this plaintiff, Sarah J. Fredericks.

4. That before the commencement of this suit, to wit, on the 31st day of March, A. D. 1875, this plaintiff demanded possession of said goods and chattels of said defendants, but said defendants refused to deliver possession of the same, or any part thereof, notwithstanding this plaintiff was then and now is entitled to the possession of the same.

5. That said defendants do now wrongfully and unlawfully withhold and detain possession of said property, goods and chattels from the possession of this plaintiff, to her damage in the sum of two hundred dollars.

Wherefore this plaintiff, Sarah J. Fredericks, demands judgment against said defendants—

1st. First, for the recovery of the possession of said property, goods, and chattels and for the sum of two thousand two hundred and thirteen dollars ($2,213.00), the value thereof, in case delivery cannot be had.

2. Second, for two hundred dollars damages and for costs of suit.

(Signed) JOHNSTON & TOOLE, AND
4 JOHN H. SHOBER,
Plaintiffs' Attorneys.

MONTANA TERRITORY,
Gallatin County, ss:

Sarah J. Fredericks, being duly sworn, says she is one of the plaintiffs in the above entitled action, and that she has heard read the foregoing amended complaint, and knows the contents thereof, and that the same is true of her own knowledge.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me this 3rd day of May, A. D. 1876.

JAMES G. DOW,
Notary Public.

And the said defendant having filed in said cause his amended answer thereto, which answer is in words and figures following, to wit:

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

5 Now come the above named defendants, by their attorneys, and for answer to the amended complaint of the plaintiffs filed herein deny each and every allegation in the said complaint contained. Defendants deny that on the 8th day of March, A. D. 1875, or at any other time, at the county of Gallatin and Territory of Montana, or elsewhere, the said plaintiff Sarah J. Frederick' was the sole or exclusive owner or possessor in her own right, as sole trader or otherwise, of the goods or chattels set out and attempted to be described in plaintiffs' said complaint.

Deny that the defendants, or either of them, ever at any time wrongfully or unlawfully took said or any goods or chattels from the possession of said plaintiff Sarah J. Fredericks.

Deny that before the commencement of this suit the said plaintiff demanded of defendants the possession of said goods or chattels, or any thereof.

Deny that said plaintiff was or is entitled to the possession of said goods or chattels or any thereof.

Deny that defendants do now wrongfully or unlawfully withhold or detain possession of said property, goods, or chattels from the possession of the said plaintiff to her damage in the sum of
6 two hundred dollars, or in any other sum.

The defendants for further answer aver that on or about the 8th day of March, A. D. 1875, the said defendant Charles L. Clark was sheriff of Gallatin County, in said Territory; and that on or about the date last aforesaid, as such sheriff, the said defendant Clark, under and by virtue of two several writs of attachment issued out of the office of the clerk of the district court in said county of Gallatin, one in a case then pending in said court, wherein Andrew J. Davis was plaintiff and W. A. Fredericks and W. H. Drew were defendants, and one in a case therein pending wherein the said Andrew J. Davis was plaintiff and Wellington A. Fredericks was defendant, said writs being dated the 6th day of March, 1875, did seize and levy upon as the property of Wellington A. Fredericks, the defendant in said writs of attachment and one of the plaintiffs herein, certain goods and chattels, consisting of flour and lumber, a portion of which is attempted to be described in plaintiffs' said amended complaint, but a particular description of said property seized by said defendant as sheriff as aforesaid is attached to and endorsed on the writs of attachment aforesaid, reference being had thereto.

7 Defendants further aver that the goods and chattels so levied upon as aforesaid at the time aforesaid under and by virtue of the writs aforesaid were at the time of said levy the property of the said Wellington A. Fredericks, one of the plaintiffs to this action; and that if the said plaintiff Sarah J. Fredericks ever at any time had possession of any of said goods and chattels or of the goods and chattels set forth in plaintiff's said amended complaint, the defendants aver that such possession was a fraudulent one, and that the same were held by her for said Fredericks under cover to conceal the same from the creditors of the said Wellington A. Fredericks and to defraud the said defendant Andrew J. Davis and other creditors of said Frederick' and prevent the collection of just debts of said Davis and others against W. A. Fredericks.

Defendants deny that the said plaintiff Sarah J. Fredericks has sustained any damage whatever by reason of the acts of these defendants; and having fully answered the defendants ask to be dismissed with their costs herein expended.

T. R. EDWARDS AND
SAMUEL WORD,
Attorneys for Defendants.

8 TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

Andrew J. Davis, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

ANDREW J. DAVIS.

Subscribed and sworn to before me this May 26, A. D. 1876.
[SEAL OF 3D JUD. DIS. COURT.] ALEX. H. BEATTIE,
Clerk of the 3rd Jud. Dist. Court, M. T.,
By JNO. N. HELDT,
Deputy Clerk.

That thereafter the said plaintiff filed a replication to said answer, which is in the words & figures following:

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

9 Now come the defendants and for replication to defendants' answer herein—

1st. Deny that at the time of the levy of the attachment herein, or at any other time, Wellington A. Fredericks was the owner of, or had any interest in, any of the property mentioned in plaintiffs' complaint herein.

Deny that any of said property in plaintiffs' complaint mentioned was ever held by Sarah J. Fredericks for the purpose of covering up the same from defendant A. J. Davis or any creditor of Wellington A. Fredericks.

3. Deny that said property was ever held by said Sarah J. Fredericks in fraud of any creditors of said Wellington A. Fredericks or to hinder or delay any creditors of said Wellington A. Fredericks.

Wherefore plaintiff demands judgment as in her complaint herein prayed for.

JOHNSTON & TOOLE,
J. H. SHOBER & SANDERS & CULLEN,
Att'ys for Plaintiffs.

MONTANA TERRITORY,
Gallatin County, ss:

Sarah J. Fredericks, being duly sworn, says she is plaintiff in the above-entitled action, and that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of
10 her own knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me this 27th day of October, A. D. 1876.

J. H. SHOBER,
Notary Public, M. T.

And the said Sarah J. Fredericks and Wellington A. Fredericks having commenced their suit in this court against Charles L. Clark and Andrew J. Davis by filing their complaint, the said complaint was in the words and figures following, to wit:

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

The plaintiff Sarah J. Fredericks, for complaint against the above-named defendants, states: That on the 15th day of April, A. D. 1875, she was, and for a long time previous thereto had been, and
11 now is, a married woman and the wife of Wellington A. Fredericks, her coplaintiff above named.

2. That on the 15th day of April, A. D. 1875, at the county of Gallatin and Territory of Montana, this plaintiff Sarah J. Fredericks was the sole and exclusive owner and possessor in her own right, as sole trader, of the following goods and chattels, to wit: Fifteen (15) sacks choice XXX (triple X) flour of the Willow Creek flouring mill make and brand, and three thousand five hundred (3,500) shingles, and four thousand five hundred feet of dry white-pine lumber, being her separate and sole property.

That said flour was of the value of one hundred and twelve dollars and fifty cents; that said shingles was of the value of twenty dollars, and said lumber of the value of one hundred and eighty dollars.

3. That the defendants, on the 15th day of April, A. D. 1875, while this plaintiff was the sole and exclusive owner of said property, at the same county of Gallatin and Territory of Montana, without this plaintiff's consent, did wrongfully and unlawfully take said goods and chattels from the possession of this plaintiff Sarah J. Fredericks.

4. That before the commencement of this action, to wit, on the
12 20th day of April, A. D. 1875, this plaintiff demanded possession of said goods and chattels of said defendants, but said defendants refused to deliver possession of the same or any portion thereof, notwithstanding this plaintiff then was and now is entitled to the possession of the same.

5. That said defendants do now wrongfully and unlawfully withhold and detain possession of said property, goods, and chattels from the possession of this plaintiff to her damage in the sum of one hundred dollars.

Wherefore plaintiff Sarah J. Fredericks demands judgment against said defendants—

1st. For the recovery of the possession of said property, or for the sum of three hundred and twelve $\frac{50}{100}$ dollars, the value thereof, in case a delivery cannot be had.

2. For one hundred dollars damages for the detention thereof and for costs of suit.

JOHNSTON & TOOLE AND J. H. SHOBER,
Att'ys for Plaintiffs.

MONTANA TERRITORY,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says that she is one of the plaintiffs in the above-entitled action, and that she has heard read
13 the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 5th day of May, A. D. 1876.

JAMES G. DOW,
Notary Public.

That thereafter the said defendants filed their answer to said complaint, which said answer is in words and figures following:

SARAH J. FREDERICK', PLAINTIFF,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS,
defendants.

In the first judicial district court, within and for Gallatin County, Montana Territory.

Now come the above-named defendants, by their attorneys, and for

answer to the complaint of the above-named plaintiffs deny each and every allegation in said complaint not herein specifically admitted or denied. Defendants deny that on the 15th day of April, A. D. 1875, or at any other time, or at any time prior thereto, plaintiff had been or was the sole or exclusive owner or possessed in her own right, or
14 otherwise, as sole trader or otherwise, of the fifteen (15) sacks of choice XXX (triple X) flour, as described in said complaint, or any part thereof, or any flour at all.

Denies that she was the owner of or seized or possessed in her own right of thirty-five hundred shingles or any shingles whatever.

Denies that she was the owner of four thousand five hundred feet of dry white-pine lumber or any part thereof, or that any part of the same was her sole or separate property.

Denies that said flour was of the value of one hundred and twelve dollars and fifty cents, or that said shingles were of the value of twenty dollars, or that said lumber is or was of the value of one hundred and eighty dollars.

Denies that on the 15th day of April, A. D. 1875, or at any other time while said plaintiff was the sole or exclusive owner of said property, these defendants wrongfully or unlawfully took said goods or chattels or any part thereof from the possession of said plaintiff. Denies that on the 20th day of April, A. D. 1875, or at any other time said plaintiff demanded possession of said goods and chattels of or from
15 defendants or that said plaintiff is or was entitled to the possession of the same or any part thereof.

Denies that defendants wrongfully or unlawfully withholds or detains possession of said goods and chattels or any part thereof, or that said plaintiff, by reason of any act on their part or either of them, was damaged in the sum of one hundred dollars or in any sum or part thereof.

Denies that plaintiff is entitled to the possession of said property or for judgment for the sum of three hundred and twelve $\frac{50}{100}$ dollars or any part thereof or for costs of suit.

The defendant further answering, avers the facts to be that on or about the 8th day of March, A. D. 1875, the said defendant Charles L. Clark was then the acting sheriff of Gallatin County, in said Territory of Montana, and that on or about the day and year last aforesaid as such sheriff under and by virtue of law separate writs of attachment issued out of the office of the clerk of the district court in said county of Gallatin and Territory aforesaid, and in a certain cause then pending, wherein Andrew J. Davis was plaintiff and William H. Drew were defendants, and the other in a certain other case then pending
16 wherein the said Andrew J. Davis was plaintiff and the said Wellington A. Fredericks was defendant, said writs bearing date the 6th day of March, 1875, did, by virtue of the authority therein contained, seize and levy upon as the property of the said Wellington A. Fredericks, the defendant in said writs of attachment, certain goods and chattels consisting of flour, shingles, and lumber, a portion of which is attempted to be described in plaintiff's said complaint for greater certainty as to the description of said property so seized by virtue of said writs of attachment as aforesaid, reference be had to the return of said sheriff on said attachments. Defendant further avers that the goods and chattels so levied upon as aforesaid at the time aforesaid were at the time of such levy and seizure the property of the said Wellington A. Fredericks, one of the plaintiffs to this action, and subject to be seized and taken on attachment as security for said Wellington A.

Fredericks' said debts and demands, and if the said Sarah J. Fredericks ever at any time had possession of said property or any part thereof, or of the goods and chattels set forth in plaintiff's complaint.
17 Defendants aver that such possession was a fraudulent one, and that the same were held by her for said Wellington A. Fredericks under cover of some false and pretended claim of right or title to cover up and conceal the same from defendant Davis and other creditors of her said husband, the said Wellington A. Fredericks, and to hinder and delay and defraud said defendant and the other creditors of the said Wellington A. Fredericks and to prevent the collection of their just debts and demands.

Defendant, further answering, avers that on and prior to the year A. D. 1873 the said Wellington A. Fredericks was wholly insolvent, and amongst other creditors was justly owing this defendant A. J. Davis in divers and sundry large sums of money, amounting in the aggregate to the sum of eight thousand dollars, to secure a part of which sums the attachments aforesaid were issued as aforesaid, and was then the legal and equitable owner of an undivided one-half of that certain grist mill or flouring mill situate on Willow Creek, in the county of Gallatin, Territory aforesaid, together with one-half of the mill site or grounds belonging to the same, also to one-half of the water rights, ditches, and flumes pertaining thereto, and for the purpose of hindering, de-
18 laying, and defrauding his said creditors, caused the same to be conveyed to the said Sarah J. Fredericks for a false and pretended consideration, not a dollar of which was paid by the said Sarah J. Fredericks. That she has ever since and now holds the naked legal title to said property, the said Wellington A. Fredericks at all times since managing and controlling the same as his own property, receiving and appropriating the profits and proceeds thereof to his sole and exclusive use and benefit, and that all the said property, goods, and chattels described in said complaint is and was derived from the profits and proceeds of said mill, and is and was at the time of said levy and seizure the property of the said Wellington A. Fredericks, and subject to be seized and attached for the payment of his said debts.

Affiant further avers the facts to be that the so-called sole tradership of the said Sarah J. Fredericks is and was a trick and fraudulent device on her part for the more effectually hiding, covering up, the property of the said W. A. Frederick', and whatever pretended title she may have acquired to said property she only holds the same in trust for the sole use and benefit of the said Fredericks.

SAMUEL WORD, R. T. VIVION.
19 THOS. EDWARDS AND JAS. G. SPRATT,
Defendants' Attorneys.

TERRITORY OF MONTANA,
County of Gallatin, ss:

A. J. Davis, being first duly sworn, on his oath states that he is one of the defendants in the above-entitled action; that he has heard the foregoing answer read, and that the facts therein stated are true of his knowledge.

A. J. DAVIS.

Subscribed and sworn to before me this October 27th, 1876.
THEO. MUFFLY, *Clerk.*

That thereafter the said plaintiffs filed their replication to said answer, which said replication is in words and figures following, to wit:

Replication.

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Now comes the plaintiff Sarah J. Fredericks, and for replication to the answer of defendants herein—

1st. Denies that any of the property mentioned in plaintiffs' complaint was the property of Wellington A. Fredericks, and denies that Wellington A. Fredericks ever had any interest in any of said property.

2. Denies that said Wellington A. Fredericks ever had any interest in the grist mill in defendants' answer described, nor the water right, machinery, privileges, nor appurtenances thereto belonging.

3. Denies that said Wellington A. Fredericks, for the purpose of hindering, delaying, and defrauding any of his creditors, he caused the legal title of the one-half of said mill, machinery, and appurtenances to be vested in the said William H. Drew; and denies that he caused it to be held by him in trust for the use nor benefit of him the said Wellington A. Fredericks, for any purpose whatever; and denies that the said Wellington A. Fredericks ever had any title, legal or otherwise, to said property vested in himself or any one else.

Denies that said Wellington A. Fredericks caused the said Wm. H. Drew to convey the legal title to said one-half of the said mill property to this plaintiff with the understanding between them that the same should be held by this plaintiff in trust for his, Wellington A. Fredericks', sole or exclusive use or purpose, and denies that there was any understanding between said Wellington A. Fredericks and said William H. Drew in relation to said mill property; and denies that this defendant accepted any conveyance nor trust for the purpose of nor with the intent to hold said property for the use or benefit of the said Wellington A. Fredericks, nor for the purpose of covering up, hindering, nor secreting the same from the creditors of the said Wellington A. Fredericks, nor for the purpose of hindering, delaying, nor defrauding them in any manner.

4. Denies that the said Wellington A. Fredericks has ever managed, used, nor controlled the said property, nor the benefits, profits, nor proceeds arising from the same, nor any portion thereof, in any manner whatever.

5. Denies that any of the property attached by the said Charles L. Clark was, at the time of the levy of the writ of attachment, nor at any other time, the property of the said Wellington A. Fredericks, and denies that the property mentioned in plaintiffs' complaint was the proceeds of said mill, and denies that the proceeds of said mill ever were subject to attachment nor seizure as the property of said Wellington A. Fredericks; and denies that said Wellington A. Fredericks ever had any attachable interest in any of the property in plaintiffs' complaint mentioned; and denies that said Wellington A. Fredericks ever had any attachable interest in said mill mentioned in defendants' answer herein; and denies that he ever owned any interest in said mill.

6. This plaintiff denies that for any fraudulent purpose she filed her declaration of intention of being a sole trader.

7. Denies that under any false nor fraudulent practice that she has pretended to own, control, nor manage any of the property of Wellington A. Fredericks, but avers the fact to be that she has only sought to manage and control her own individual and sole property, and to protect herself in her own individual and sole property and rights.

8. Denies that she has permitted, at any time, the said Wellington A. Fredericks to manage nor control any of the property in her complaint herein mentioned, nor any of the property in defendants' answer herein mentioned, as his own property.

9. Denies that she has permitted the said Wellington A. Fred-
23 ericks to apply any of the proceeds nor profits arising from any of said property to his own use nor purpose.

10. Plaintiff denies each and every allegation in defendants' answer not hereinbefore specifically denied, except that the attachment was duly issued.

Wherefore plaintiff prays judgment, as in her complaint herein prayed for.

JOHNSTON & TOOLE,
CULLEN AND SANDERS AND J. H. SHOBER,
Att'ys for Plaintiff.

TERRITORY OF MONTANA,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says she is one of the plaintiffs in the foregoing-entitled action, and that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of her own knowledge except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 15th day of December, 1876.

GEORGE L. DUKE,
Justice of the Peace.

24 That thereafter, to wit, on the 11th day of May, A. D. 1877, and at the May term, 1877, of this court, an order was made therein consolidating the two foregoing actions.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
CHARLES L. CLARK ET AL., DEF'TS.
} Consolidated with case No. 4. (132.)

Come as well the said plaintiffs by Messrs. E. W. Toole and John H. Shober, esq'r's, their counsel, as the said defendants by Messrs. R. P. Vivion, T. R. Edwards, James G. Spratt, William Chumasero, and A. M. Woolfolk, esq'r's, their attorneys. Whereupon by consent of counsel it is ordered here by the court that this cause be and the same is hereby consolidated with cause No. 4 (132), entitled Sarah J. Fredericks against Charles L. Clark, sheriff, &c.

These causes thereafter were proceeded with in said court under the title of the cause of Sarah J. Fredericks and Wellington A. Fredericks, as plaintiffs, vs. Charles L. Clark and Andrew J. Davis, defendants.

On appeal the defendants submit the following statement:

25 SARAH J. FREDERICKS ET AL.
(132) *vs.*
CHARLES L. CLARK, SHERIFF,

AND

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks
vs.
CHARLES CLARK AND ANDREW J. DAVIS.

PLAINTIFFS' TESTIMONY.

SARAH J. FREDERICKS. Known Davis since '66, and Clark since '75. I am engaged in milling and blacksmithing, as sole trader, since spring of 1874. (Here witness produced and identified her sole-trader papers, to wit:)

Declaration of the intention of Sarah J. Fredericks, a married woman, to transact business in her own name as sole trader.

Know all men by these presents that I, Sarah J. Fredericks, a married woman, residing with my husband at Gallatin City in Gallatin County, Montana Territory, being desirous of availing myself of the benefits of an act of the legislature of the said Territory of Mon-
26 tana, entitled "An act to authorize married women to transact business in their own names as sole traders," approved February, 1874, do hereby make and publish, and by these presents give notice unto all persons concerned or in anywise interested, that this my declaration of intention of transacting business in my own name as sole trader is made under the provisions of said act, and that from and after the date of the proper record of this declaration, it is bona fide my intention to carry on and transact the business of a flour manufacturer and miller; and that it is further my intention to also carry on and transact the business of a stock raiser, owner and grazer; also a general blacksmithing business, and furthermore follow and pursue, carry on and transact in my own name and for my own use and benefit and for the benefit of my children or any member of my family who may be dependent on me for support and maintenance, any other business, calling, avocation, profession, or pursuit in life which I may at any time find it necessary to enter upon or engage into for the purpose, and for the proper support and maintenance of those who may be dependent
27 upon my exertions for their means of livelihood.

I furthermore make known and declare that the original amount of capital which I have invested in the aforesaid business does not exceed the sum of ten thousand (10,000) dollars, nor was the same derived from any funds belonging to my husband.

In testimony whereof witness my hand and seal this twenty-eighth day of March, A. D. 1874.

SARAH J. FREDERICKS. [SEAL.]

TERRITORY OF MONTANA,
County of Gallatin, ss:

On this 28th day of March, A. D. 1874, personally came before me, Robert W. Hill, a notary public in and for Gallatin County, Montana

Territory, Sarah J. Fredericks, to me well known to be the person who executed the foregoing instrument, and acknowledged that she executed the same freely and voluntarily, and for the uses and purposes therein set forth.

In testimony whereof witness my hand and official seal the day and year first aforesaid.

ROBERT W. HILL,
Notary Public.

{ R. W. HILL, NOTARY SEAL, MONTANA. }

28 Received for record March 30th, 1874, at 4 o'clock p. m. and recorded in Vol. "I" of deeds, pag', 441; fee $3.00.

[GALLATIN CO. SEAL.] ARCH. GRAHAM,
Recorder.

Know the property mentioned in complaint; I held same as sole trader; defendant Clark, as sheriff, took the same from me. The value of the lot attached on March 7, per sack, was $7.00; 15 sacks afterwards attached was $7.50 per sack; the lumber was worth 2 cents per foot; I never knew that the lumber was sold; I forbid them taking the property, as I claimed the same was my own, also same as to Reeves, who claimed to be deputy sheriff. The first lot of flour was worth $7.00 per sack, the last lot attached was worth $7.50 per sack. There was also about 5,000 feet of lumber taken from my possession worth $30.00 to $40.00 per thousand. There was also taken by defendant Clark 3,500 shingles; they were worth $5.00 per thousand; also 107 bushels wheat worth $2.00 per bushel. All of the flour, lumber and shingles were in my possession when levied upon and taken. I forbid the taking of said property at the time and demanded possession of it from defendant Clark several times afterwards and previous to commencing suit.

Cross-examined by def't's:

29 I got the lumber from Drew; Drew owned the saw-mill; I bought the lumber in 1874; it was attached in 1875; I acquired some of the flour by purchase; it was ground at the Willow Creek mills.

Question. When did you get the flour?

(Objected to by plaintiffs as irrelevant, which objection was by the court sustained.

To the sustaining of the said objection and the ruling of the court thereon defendants at the time excepted.)

Question. State how and in what manner you acquired title and possession to the flour described in complaint?

(Objected to as irrelevant by plaintiff, and objection sustained and the witness not allowed to answer same.

To which ruling in sustaining said objection defendants at the time excepted.)

Question. Was or not this flour in controversy the proceeds of toll of said Willow Creek mills for the years 1873 & 1874?

(Objected to by plaintiffs; which objection was by the court sustained and the witness not allowed to answer.

To the ruling of said court as aforesaid defendants at the time excepted.)

30 Question. Was any portion of said flour the proceeds of said mill during the existance of lease dated November 14,

1873, from defendant Davis to W. A. Fredericks, or at any other time?

(Objected to by plaintiff as irrelevant; which objection was by the court sustained, and to which ruling defendants at the time excepted.)

Question. Do you know of any one else claiming that flour or any part of the same?

(Objected to by plaintiff as irrelevant; which objection was by the court [sustained] *overruled.*

To the ruling of said court in sustaining said objection and in refusing to allow said witness to answer said interrogatory defendants at the time objected, excepted.)

Did any one else other than yourself claim possession of the flour mentioned or in controversy at or the time of the levy of the attachment?

I was not aware that any one did at the time of the levy.

Did you get Mr. Greene to claim said flour at the time of the levy?

(Objected to by plaintiffs; which objection the court sustained and refused to allow the witness to answer. To which ruling the defendants at the time excepted.)

31 Did you not at or before the levy get Mr. Greene to so claim said flour?

(Objected to by plaintiff; to which objection the court sustained and refused to allow the witness to answer. To which ruling the defendant at the time excepted.)

State whether any of this flour so levied upon by the sheriff was from the proceeds of grain purchased by you or was proceeds of grain owned in whole or in part by your husband.

(Objected to by plaintiffs; which objection the court sustained and refused to allow the witness to answer. To which ruling the defendant at the time excepted.)

Plaintiff closed in chief.

Defendant CLARK was here introduced as a witness.

Mrs. Fredericks told me she claimed part and that Granniss claimed 200 sacks of flour; she did not say how much Greene owned nor how much she owned; James Greene presented me an affidavit claiming 200 sacks of the flour attached, which affidavit was here introduced and admitted; I attached 496 sacks on March 8, 1875; of this number I returned to John W. Granniss 201 sacks on his affidavit
32 of ownership; other flour was delivered to other parties who claimed; 2 sacks were stolen from me; one sack was returned to the plaintiffs; so making of this 496 sacks I attached, I sold at public auction 280 sacks.

Copy of sheriff's return on attachment.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, hereby certify and return, that by virtue of the writ of attachment hereunto appended I did, on the 8th day of March, 1875, levy upon as the property of the said defendant W. A. Fredericks the following described property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring-mill, situate on Willow Creek, on section number seven (7), township numbered one (1), south of range numbered one (1), east of the lands granted to the North. Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tene-

ments, hereditaments and appurtenances, as well as the one-half of all the mill-dams, races, flumes, fixtures and machinery thereunto belonging or in any wise appertaining; also 498 sacks of flour, a quantity of wheat, bran, shorts, and all the tools and other property in the
33 building claimed or owned by the said defendant; also a pile of lumber, 500 feet more or less, lying close to the mill; also the frame dwelling-house situate and lying in Gallatin City, Gallatin County, together with the land upon which the house is situated, and the log house occupied by J. H. D. Street, and all other improvements upon said land claimed and owned by said defendant Wm. A. Fredericks.

Witness my hand this the 9th day of March, A. D. 1875.

C. L. CLARK,
Sheriff.

List of property attached by virtue of the writ of attachment hereunto appended, to wit:

One blacksmith's forge, one bellows, one anvil, one vice, two screw-plates, hammers, tongues, coal' chisels, one handsaw, blacksmith's chest, one diamond plow, thirty bushels of charcoal, more or less, one lot of horseshoes (new) and lot of iron, one dirt-scraper.

Witness my hand this the 20th day of March, A. D. 1875.

C. L. CLARK,
Sheriff of Gallatin County, M. T.

I attached in all about 3,000 feet of lumber, more or less, and about 3,000 shingles. The lumber was worth about $25.00 per thousand feet, and the shingles about $2.50 per thousand. I know I bought shingles at that price.

34 Defendant DAVIS was here introduced, and testified as follows, to wit:

About March 20th, 1875, flour was worth about $6.00 per sack at Willow Creek mills, and at the time of sale flour was worth at wholesale about $5.50 per sack, and at retail was worth about $6.00 per sack; the lumber attached was refuse, and was odds and ends left over from building of the mill and had been picked over. It was probably worth $25.00 per thousand feet; the shingles ought to be worth there about $3.50 per thousand. I was present at the time of the attachment, and there was in the mill about 480 sacks of flour. I heard the plaintiff (Mrs. F.) say that the flour in the lower story was Granniss'es. I don't remember that she said she owned any of the flour. She said the flour inside belonged to other parties, and mentioned Granniss; that Granniss owned 200 sacks. I don't know that she stated how much belonged to Greene. I owned ½ of the Willow Creek mills, and W. A. Fredericks owned the other half, and held it in his wife's name. A short time before the levy I was at the mill, and talked to both Mr. and Mrs. Fredericks. Mr. F. went with me to the mill, as I wanted to see how much toll I had, and I could only find about 100 bushels of wheat. I asked if I had any flour from my toll. He gave
35 me no satisfaction. They proposed to buy my interest in the mill with flour that belonged to others; they told me that my toll was stolen by Mood; they would not show me the books; said they were going to Bozeman, and would bring the books with them. Soon after I saw them at Bozeman, and asked them if they had brought up the books; they answered by asking what I would take for my in-

terest in the mill in flour. I charged them with having stolen my wheat and ground it into flour; they did not deny it.

Cross-examined:

I came here in July, 1865, for the purpose of looking at the country and finding a market for goods I had on a train coming to the Territory. I received no proceeds of sale of flour at public sale at time of sale of the flour attached. Flour was worth less in May than April, 1875. I did not charge Mr. Mood with stealing the flour, nor have I ever written any letter indicating any such thing. I think the flour brought from $5.35 to $6.00 per sack. This, or the most of this, lumber came from the Fredericks & Drew mill; at least this is what both told me. Drew told me that the shingles came from his mill. The man that bought this flour conveyed it to Helena, and lost money on
36 it. I believe there was no more than 6 or 8 thousand shingles levied upon. Mr. Fredericks had the key of the mill and refused to let me in the mill where the flour was stored. Mrs. Fredericks told me that she intended to take out or file papers as a sole trader, as Thomas was watching Mr. Fredericks with intention of levying upon his property to satisfy a judgment; that either Toole or Street had advised her to do so. Mr. Fredericks & Mr. Drew owned one-half of the mill at the time I leased my half to Fredericks. I never sold to Mrs. Frederick, but did convey without consideration to her the old Ault mill that stood above Fort Ellis, and that was afterwards removed to Middle Creek. I never saw the deed transferring the saw-mill from Mrs. Fredericks to Drew, and Drew's interest in grist-mill to Mrs. Fredericks; but both told me this had been done, and so Fredericks informed me. I don't know that she ever told me in Helena that she was going to take out sole-trader's papers. As to the sale of flour at the Willow Creek mill I do not remember that I directed the sheriff to sell, or that I directed my attorneys to have it done. I don't know who hauled the flour so sold by the sheriff to Helena. I did not have anything to do with the flour after it was sold.

Redirect examination:

37 At the time of the sale of the flour, it was difficult to get transportation, because of bad roads. It was lower than in March. In 1870 or 1871, I conveyed to Mrs. Sarah J. Fredericks the undivided one-half of the Ault saw-mill, it being the same interest held by me for Mr. W. A. Fredericks. Mr. Ault was owing myself and Mr. Fredericks jointly. Mr. Ault gave me a mortgage in my name to cover the entire debt. This mortgage I foreclosed and purchased the property for myself and Mr. Fredericks and held it in my own name. Afterwards Mr. Fredericks requested me to convey his half interest in the property to his wife, which I did without any consideration whatever, passing from Mrs. Fredericks. I conveyed my half interest in the saw-mill to W. H. Drew. In relation to the building of the Willow Creek grist mill, I was to furnish all the machinery and be one-half owner of the same. Mr. W. A. Fredericks and W. H. Drew were to furnish all other material; build the mill and be joint owners of the other half. Near the completion of this grist-mill Mrs. Sarah J. Fredericks conveyed Mr. W. A. Fredericks' interest in the saw-mill, so held by her in her name, to W. H. Drew, in consideration of which W. H. Drew conveyed his interest in the grist-mill to Mrs. Sarah J. Fredericks. There was no con-
38 sideration save the exchange as above. This contract was made between W .A. Fredericks and W. H. Drew in my presence at my house in Helena in the spring of the year 1874; afterwards, Mr. Fred-

ericks had possession of the grist-mill and retains possession of the same and now manages and controls the same.

Recross-examination:

I was, I believe, at the mill in Feb'y, 1874, and stayed over night. Fredericks was in possession of my half of the mill under lease. I don't think the lease and exchange of interests by Fredericks and Drew were made at the same time. I am not able to state.

Re-examination:

There was no consideration from Mrs. F. to me for conveying F's. interest in saw-mill to her.

CLARK recalled in chief:

Fredericks had possession of the grist-mill when I attached the flour; 498 sacks I attached; I sold 280 sacks; 201 sacks were delivered to Grannis on his affidavit; 5 sacks were delivered to another party upon his affidavit; 2 sacks were stolen from my possession; 8 sacks to Mr. Finsley on his receipt; 282 sacks were stolen from me
39 at the mill after the levy, and I found all in Mrs. Sarah J. Fredericks' house. I have since refreshed my memory as to price of flour at the time and it was worth $5.25 per sack of 100 pounds.

Cross-examined:

I sold 280 sacks of flour at public sale at my own instance; I sold April 17, 1877; have talked to defendant Davis about it, and he gave me an indemnity bond. I gave Mrs. F., by consent of Davis, one sack of the 498 sacks of flour. Davis' attorneys drew the bond and obtained the signatures to it and gave it to me. Davis' name is not to the bond

W. V. RYAN. I know the Willow Creek mill, and Mr. F. constructed it. I owned the ground and Mr. F. contracted with me for the ground on which to build the mill. He was building the mill, and afterwards him and Davis was to build; Davis to furnish the machinery and F. to build and furnish the lumber, and he has been there in possession ever since.

Cross-examined:

Mrs. F. now lives at the mill. I have been at the mill in the interest of Davis and in possession of his half. Mrs. F. claimed to own one-half and claimed all the flour attached.

40 Re-examination:

I was there in the fall of 1875, in the interest of Davis, and the mill was built in 1873.

Recross-examined:

I don't know when Mrs. Fredericks first claimed interest in the mill.

MARSHALL CORSIEN. In March, 1875, Mr. and Mrs. Fredericks asked me to store some flour, as they thought Mr. Davis wanted to attach it. In last of February or 1st of March, 1875, Mr. Fredericks wanted me to take some flour. I told him I could not; that I was too poor. He said Mrs. Fredericks would hand me the money, and I could return it to her. This was flour then at the Willow Creek mill.

Cross-examined:

They never told me whose flour this was.

C. W. HASKINS. I knew Mr. and Mrs. F. before March 8th, 1875.

Rebuttal by plaintiffs.

ELLISON. Know Mrs. Fredericks since spring of 1874 at Willow Creek mill. She bought some wheat in 1874. I know she bought 3 or 4 lots of wheat of Deep Creek and Boulder. Of this amount all that I stored was stored upstairs on floor of mill. Mill started up somewhere in last of July or 1st of August, 1874. I don't know how the wheat was tolled in respect to her wheat. I know that there was in July, '74. I hauled after I went there about 4,000 feet.

Cross-examined:

I was used for different purposes around the mill. Mr. Fredericks did the work. Mrs. Fredericks hired me, and I looked to her for the money. I knew nothing about the ownership except what she told me. I knew of her selling flour to Lane. This was about the time Granniss was there. It was 2 loads that I know of. He paid Mrs. Fredericks for the flour in presence of Bill Ryan. I saw Mrs. Fredericks with the money first. My understanding was, if my eyes did not deceive me, that Mike Lane got the money from Mrs. Fredericks, and he gave it back to her in 15 minutes, in presence of Mr. Ryan. I went to work there in fall of '75, and continued there until some time in 1875.
42 I heard that Mrs. Fredericks was to give Lane the money, and he was to give it back to her. The first load he hauled was about 20 sacks; it may have been 15 sacks.

Re-examination:

I think this was in the fall of 1875. I don't know whether it was after the attachment.

JOHN W. GRANNISS. I was employed at Willow Creek mill in fall of '74 as miller. Mrs. Fredericks had wheat there then, up-stairs in a bin, that she claimed as her own. There was some toll wheat put in with it. Her toll was then put in. I ground the wheat, and as thus ground was placed in the northeast end of the mill, and this flour was attached.

Cross-examined:

I ground out of this bin. I ground 200 sacks of flour. I can't say how this bin of wheat was accumulated. While I was there Mr. Fredericks put her principal toll in this bin. I saw toll wheat in sacks; don't know to whom it belonged, and don't think any of it was ground with the bin wheat. There was other flour in the mill, and I don't know from what wheat it was ground. Must have been 500 sacks flour
43 in mill when I left and some wheat. This 500 sacks included the 200 I had there in the mill. All the wheat ground while I was there was tolled; one-sixth bushel is the amount toll taken. I was there a few days in the middle of March, '75. Davis' toll was kept separate, and not mixed with Mrs. Fredericks'.

MIKE LANE. Mrs. Fredericks has carried on the mill as sole trader 3 or 4 years. I don't know of her buying any wheat in fall of 1874. I was in employ of Mrs. Fredericks in 1874, and maybe in 1875. There was wheat in the mill of '74 that Mr. Fredericks said was the woman's toll. At the time I bought the flour referred to by Allison of Mrs. Fredericks, Allison was working there, and it was several months after the flour in controversy was attached. It was no part of this flour I purchased.

J. V. RYAN. I was at the mill in Sept., '75, in the employ of Davis. It was along in the winter of '75 that Lane got the flour referred to by Allison; it was several months after the attachment.

44 WATTS. Know Mrs. Fredericks since 1873. She has been in the milling business. She bought wheat in March, 1875. I was called on about April 15, '75, to help Mr. Fredericks measure the lumber, and I think there was 5 or 6 thousand feet; there was 17 bunches of shingles. I knew she was purchasing wheat on her own account as sole trader in March, 1875, and I sold her some. I know she ground it into flour, and the flour was in the mill.

(Motion to strike out testimony as to lumber was sustained.)

MRS. FREDERICKS. I was living on Willow Creek when I got out my sole trader's license. I talked with defendant Davis about it at Helena and Willow Creek mill, and consulted with Toole about at request of Davis. The wheat in the bin upstairs I got from several parties, viz: Mr. Hartman, James Harper et al., Dr. Franur, Mr. Watts, and another; all this amounted to 700 bushels of wheat. Of this Granniss ground 202 sacks, and balance by Fredericks. I first obtained my deed to my interest in the Willow Creek mill on March 31st, 1874. (The deed is here admitted in evidence.) I was plaintiff in an action to determine my title in this property.

45 (The pleadings in title case are here introduced and objected to, and objection overruled, and ruling excepted to.

Contract between Davis and Drew in building the Willow Creek mill was offered; objected to; objection overruled, and to ruling defendants excepted.)

This Lane flour was sold in November, 1875.

Cross-examination:

First attachment was issued on March 8, 1875. Hartman, 25 bu.; Do. Franse, 63 & 14 bu.; from Deep Creek, 50 bu., and again 550 from another gentleman; Harper, 10; Watts, 58^{53} bu. I paid for all this wheat in my own money. I am blacksmithing. Mr. F. does the work and I pay him. I borrowed the money from W. L. Perkins, $500.00. I paid $1.00 per bu. for wheat cr. & 1.25 for bal'c. I borrowed the money about July 1, 1874. Sold my toll and repaid it in 1875; about 160 sacks of my toll. I sold my toll principally to Kleinschmidt. Mr. Hall may have got a few sacks. I have told you where and how I got all of this flour; it was from the wheat purchased by me in May, 1874. I purchased 25 bushels from Hartman, six and one-half sacks of flour of Tickney. In June, 1874, I purchased 50 bushels of Chrisman, and 550 bushels of Drainsky, from Deep Creek, which delivered some

46 time in the fall of 1874, in different parcels. I purchased 30 bushels of Defrane, and some other small lots of different parties. This is how I got title to and possession of the flour sued for in this action. No part of it was tolls of 1873 or 1874, and no one had any interest in it except myself. None of said flour was proceeds of the mill during the existence of Fredericks' lease. He always took his own flour and disposed of it himself. I do not know what he did with it. I controlled my own and tried to keep Davis from getting hold of it. I contracted to sell Green some flour, but it was attached before delivery, and the contract fell through. I knew of no one claiming possession or the right of possession to any of the flour attached but myself.

I never got any one to claim possession of it. None of the flour was from grain owned by my husband. I have told you how I got all of it two or three times.

Deed.

Know all men by these presents that we, William H. H. Drew and Annie Drew, his wife, of the county of Gallatin, in the Territory of Montana, in consideration of the sum of $2,000.00 (two thousand dollars), to them in hand paid by Sarah J. Fredericks, of the said
47 Gallatin County, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, remise, release, and quitclaim unto the said Sarah J. Fredericks, and to her heirs and assigns forever, the following described real estate, situate in the county of Gallatin, in the Territory of Montana, to wit:

One undivided one-half of a certain flouring mill, situate at the upper end of Lower Willow Creek Valley, on the northeast quarter of the southeast quarter of section seven, township one south, of range east, together with the same half interest in and to all the tools, implements, water rights, mill-dams, and all the appurtenances thereto belonging or in any wise appertaining; also the whole of the dwelling-house situate on the said mill ground, with all the tenements, hereditaments, and appurtenances thereunto belonging; and also all the estate, right, title, interest, claim, and demand whatsoever, in law or in equity, of the said William H. H. Drew and Annie Drew in and to the said premises and the appurtenances, to have and to hold the same unto the said Sarah J. Fredericks, her heirs and assigns, forever.

48 In witness of which we have hereunto set our hands and seals on the thirtieth day of March, A. D. 1874.

WM. H. H. DREW. [SEAL.]
ANN DREW. [SEAL.]

TERRITORY OF MONTANA,
County of Gallatin, ss:

On the thirteenth day of March, A. D. 1874, personally came before me, the undersigned, notary public within and for said county, W. H. H. Drew and Ann Drew, his wife, to me known to be the persons described in and who signed the foregoing conveyance as grantors, and acknowledged that they had executed the same freely and voluntarily for the uses and purposes therein expressed. And the said Ann Drew was made acquainted with the contents of said conveyance and acknowledged, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same.

In witness of which I have hereunto subscribed my name and affixed my seal on the thirteenth day of March, A. D. 1874.

[L. S.] J. J. DAVIS,
Notary Public.

49 Received for record March 31st, 1874, at 4 p. m., and recorded in vol. "I" of deeds, at page 444.

Fees, $2.50; paid, $2.50.

ARCH. GRAHAM,
Recorder.

In the district court, first judicial district, Gallatin County, Montana Territory.

SAHAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, defendants.

1st. Now comes the plaintiff in the above-entitled cause and states that she is a married woman and as such seized and possessed in her own right and of her sole and separate property of an undivided one-half of the premises hereinafter mentioned; that the said defendant, Andrew J. Davis is the owner of the undivided other half thereof, and that the same is held, occupied, and possessed by said plaintiff Davis as tenants in common, and that no other person has any interest therein save said Gilbert, who holds a mortgage of record for about $4,000.00.

2. That said property is known and designated as a certain
50 flouring mill situate at the upper end of lower Willow Creek valvey, on the northeast quarter of the southeast quarter of section seven, township one south, of range one east, with all the tools, implements, water rights, mill-dam, and all the appurtenances thereto belonging or in anywise appertaining, all in the county of Gallatin and Territory of Montana.

3. That said plaintiff and defendants are not interested in any other real or personal property, as tenants in common or otherwise, jointly in the Territory or elsewhere.

4. That plaintiff is desirous of having partition or sale made of said property, and that plaintiff verily believes, and therefore avers, that partition or division thereof cannot be made according to the respective interests of the parties therein without great prejudice to the owners thereof.

5. And the said plaintiff, for further cause of complaint, shows unto this honorable court that since the 15th day of December, A. D. 1873, and at the present time, there has been no settlement or accounting between this plaintiff and said defendant Davis for or on account of divers and sundry sums of money, labor, and material by them
51 and each of them laid out and expended in and about preserving, operating, and taking care of said mill, mill-dam, water right, and property, and that during said time said defendant Davis became and is indebted to this plaintiff for and on account of money, work, and material paid, laid out, and expended in and about improving and operating said property in the sum of about six thousand five hundred dollars, the one-half of which sum is $3,250.00, now coming to plaintiff by said defendant Davis over and above all just claims or demands of said defendant Davis; that said amount was necessary to be expended as aforesaid and upon said property, and that the same added greatly to the value thereof.

Wherefore plaintiff prays this hon. court that said property and the whole thereof be sold according to the rules and practice of this court and the law applicable thereto; that the proceeds thereof, after paying the costs and expenses of sale (whatever amount), be returned unto this court, and that the same be divided and paid over to the parties hereto in accordance to their respective rights and interests in the premises; that an accounting be had between this plaintiff and said defendant Davis, and the amount found due plaintiff be paid out
52 of the proceeds of said sale as in equity and justice it should be,

and that judgment therefor be given accordingly, and that plaintiff have such other or further relief as may be just and equitable.

SHOBER AND JOHNSTON & TOOLE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA,
County of Gallatin, ss:

Sarah J. Fredericks makes oath and says that she is the plaintiff herein; that she has heard the foregoing complaint read and knows the contents thereof, and that the matters therein stated are true of her own knowledge except as to such matters as are therein stated on information and belief, and as to those matters she believes it to be true.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 16th day of March, A. D. 1875.

D. H. KITCHAM,
A Justice of the Peace in and for Gallatin County, Montana Territory.

Filed March 15th, 1875.

W. T. DAVIS, *Clerk.*

53 In the district court, first judicial district, county of Gallatin, Territory of Montana.

ANDREW J. DAVIS, PLAINTIFF,
vs.
WELLINGTON A. FREDERICKS, DEFENDANT.

And now comes the above-named plaintiff, by leave of the court first had and obtained, and, complaining of the above-named defendant, avers that heretofore, to wit, on the 14th day of November, A. D. 1873, at the county of Gallatin, in the Territory of Montana, the said plaintiff was the owner and in the actual possession of an undivided one-half of a certain flouring and grist mill, situate on what is known as Willow Creek, in the said county of Gallatin; that on the day aforesaid the said plaintiff and the said defendant entered into a contract, in writing, whereby the said plaintiff leased to the said defendant the said undivided one-half of said mill and the appurtenances for the term of one year from the aforesaid date, which said written contract was duly executed by the said plaintiff and the said defendant; that by the terms of the said contract the said defendant, in consideration of the
54 covenants and agreements on the part of said plaintiff contained in the said contract or lease, undertook and agreed to pay and deliver to said plaintiff one-fourth of the gross earnings and receipts of the said mill and premises, including wheat bran, screanings, and all kinds and description of produce usually received and ground at flouring and grist mills; that under said contract or lease the said defendant entered in and took possession of the said plaintiff's one-half of said mill on the day aforesaid and all the appurtenances connected therewith, and has used and occupied and possessed the same from said 14th day of November, A. D. 1873, until the day of the commencement of this action, the said defendant holding over and retaining the possession thereof under the stipulations, provisions, and agreements of the aforesaid contract and lease; that the gross earnings of said mill and

premises during the time aforesaid are and have been, grain, flour, bran, shorts, and screanings, of the value of ten thousand dollars; and that on' *the* fourth of said gross earnings of said mill are and have been of the value of two thousand five hundred dollars, and the same are now due, unpaid and undelivered to this plaintiff; that the said plaintiff heretofore,
55 to wit, on the 5th day of March, 1875, at the said county of Gallatin, demanded from the said defendant the payment and delivery to him of the said one-fourth of the gross earnings of said mill as aforesaid, under the said contract due and deliverable to him, the said plaintiff, but to pay or deliver the same, or any part thereof, the said defendant hath heretofore failed and refused, and still doth fail and refuse. And the said plaintiff, further complaining, for a separate cause of action alleges that on the 10th day of October, A. D. 1867, at Gallatin City, in the county of Gallatin, Montana, the said defendant made his certain promissory note or contract, in writing, bearing date on that day, which said note or contract, in writing, is in the words and figures following, to wit:

GALLATIN CITY, *October* 10*th*, 1867.

For value received I promise to pay A. J. Davis twelve hundred dollars in flour, at the Helena prices, per quantity, less the freight from this place to Helena, to be delivered on or before the first day of June next. This contract is upon a gold basis.

(Signed) W. A. FREDERICKS.

[Int. rev. stamp, 50 cents.]

And then and there delivered the said promissory note or contract to the said plaintiff, who is now the owner and holder thereof; that
56 the said defendant failed and refused to deliver the said flour, or any part thereof, to the said plaintiff at the time the same was to be delivered under the said instrument in writing above set forth, or at any other time, and failed to pay the said plaintiff the said sum of twelve hundred dollars, or any part thereof, although both said flour and said sum of money were demanded at the time the same was deliverable and payable under the said promissory note or contract; that by reason of the failure of the said defendant to deliver the said flour as provided in the said instrument in writing, this plaintiff has been damaged in the sum of $1,200.00, together with interest on the said amount from the 1st day of June, A. D. 1868.

And the said plaintiff, further complaining of the said defendant, for a separate and further cause of action states that the said defendant at the time of the commencement of this action was indebted unto him on open account in the sum of four thousand six hundred dollars, the same being for divers and sundry sums of money loaned the said defendant at his special instance and request between the 10th day of October, A. D. 1867, and the 1st day of February, 1874, and for
57 money paid, laid out, and expended for the said defendant at his special instance and request by this plaintiff between the days aforesaid, and for lumber, blacksmith's tools, and goods, wares, and merchandise sold and delivered to the said defendant at his special instance and request between the dates last aforesaid; that no part of the said sum of $4,600.00 has been paid by the said defendant, although often demanded.

Wherefore the said plaintiff demands judgment against the said defendant for the sum of $2,500.00, with interest thereon from the 6th day of March, 1875, and also for the sum of $1,200.00, with interest due thereon from the 1st day of June, A. D. 1868, and also for the sum of

$4,600.00, with interest thereon from the 1st day of February, A. D. 1874, besides costs of suit.

SAMUEL WORD, THOS. EDWARDS,
CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Andrew J. Davis, being first duly *duly* sworn, deposes and says that he is the plaintiff named in the foregoing amended complaint; that he has heard the same read and knows the contents thereof; that the
58 same is true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes it to be true.

A. J. DAVIS.

Subscribed and sworn to before me this 1st day of April, A. D. 1876
W. F. CHADWICK,
Notary Public.

(Endorsed:) No. 2. Andrew J. Davis vs. W. A. Fredericks. Amended complaint. Filed April 5th, 1876.

W. T. DAVIS, *Clerk.*

A true copy. Attest my hand and seal of said court affixed this 14th day of May, A. D. 1877.

THEO. MUFFLY, *Clerk.*

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, do hereby certify and return, that by virtue of the writ of attachment hereunto appended I did, on the 8th day of March, 1875, levy upon the property of the said defendant, W. A. Frederick, the following described property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring mill situate on Willow Creek, on section numbered seven (7), township numbered one (1) south, of range numbered one (1) east of the lands granted to the North. Pacific Railroad Company by the
59 United States, together with the equal one-half of all and singular the tenements, hereditaments and appurtenances, as well as the one-half of all the mill dam, races, flumes, fixtures and machinery thereunto belonging or in any wise appertaining; also 498 sacks flour, a quantity of wheat, bran, shorts, and all the tools and other property in the building claimed or owned by the said defendant; also a pile of lumber, 500 feet more or less, lying close to the mill; also the frame dwelling-house situate and being in Gallatin City, Gallatin County, together with the land upon which said house is situated, and the log house occupied by J. H. D. Street, and all other improvements upon said land claimed and owned by said defendant, W. A. Fredericks.

Witness my hand the 9th day of March, A. D. 1875.

C. L. CLARK, *Sheriff.*

List of property attached by order of the writ of attachment hereunto appended, to wit: One blacksmith forge, 1 bellows, one anvil, one vice, two screw-plates, hammers, tongs, cold chisels, one handsaw, blacksmith chest, one diamond plow, thirty bushels of charcoal, more or

less, one lot of horseshoes (new) and lot of iron, 1 dirt-scraper.
60 Witness my hand the 20th day of March, 1875.

C. L. CLARK,
Sheriff of Gallatin County.

A true copy. Attest my hand and the seal of said court hereunto affixed this 14th day of May, A. D. 1877.

[SEAL.] THEO. MUFFLY, *Clerk.*

Writ of attachment.

In the district court of the 1st judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, by the plaintiff in the said action, to recover from the defendant, W. A. Fredericks, in the said action the sum of $2,500.00 *dollars* lawful money of the United States, besides interest at the rate of per cent. per from the day of , A. D. 187 , and costs of suit; and the necessary affidavit and under-
61 taking herein having been filed as required by law:

Now we do therefore command you, the said sheriff, that you attach and safely keep all the property of said defendant, W. A. Fredericks, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant give you security by an undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking and hereof make due and legal service and return.

Witness Hon. F. G. Servis, judge of said district court of the first judicial district, this 6th day of March, A. D. 1875.

Attest my hand and the seal of said court the day and year last above written.

[L. S.] W. F. DAVIS, *Clerk.*

Filed on return March 9th, 1875.

W. F. DAVIS, *Clerk.*

62 In the first judicial district court, within and for Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, DEFENDANTS.

And now comes the above named defendant Andrew J. Davis, and by leave of the court first had and obtained, and for amended answer to

the said plaintiff's complaint filed herein, denies that the said plaintiff, as a married woman, sole trader or otherwise, is or ever was seized or possessed in her own right and as her own and separate property or otherwise of the property or premises mentioned and described in said complaint.

Defendant admits that he is the owner of the undivided one-half of the said premises and property, but denies that the same is owned or possessed by him as tenant in common or otherwise with the said plaintiff. Defendant denies that no person save the said plaintiff and this defendant has any interest in the said property save said Gilbert,
63 mentioned in the said complaint on the contrary this defendant avers that W. A. Fredericks, the husband of the said plaintiff, is now, and at all times since the erection of said mill in the said complaint *in the said complaint* mentioned has been, the owner of the undivided one-half of the said premises and property and the co-tenant of this defendant. Defendant admits that the mortgage executed by the said plaintiff to the said defendant Caleb Gilbert upon the said premises appears of record in the recorder's office of the said county of Gallatin, but defendant denies that it is any lien upon the said premises, and avers that at the time of the execution thereof the said plaintiff had no interest in the said premises belonging to the said W. A. Frederieks as hereinafter stated, and that there was no consideration for the execution thereof or that the same was ever delivered to the said Gilbert, and that the same was, without the knowledge or consent of the said Gilbert, executed and placed on the records of the said county of Gallatin for the purpose of hindering, delaying, and defrauding this defendant and other creditors of the said W. A. Fredericks, husband of said plaintiff, out of their just debts and demands owing as aforesaid
64 and for that reason the same is fraudulent and void.

And the said defendant, further answering, denies that he now is or ever was indebted unto the said plaintiff in any manner or in any manner or amount whatsoever or in any services or at all on account of work, money, or materials paid, laid out, or expended in or about the improving, preserving, or operating said property and said mill. Denies that plaintiff ever paid, laid out, or expended any money or property or performed any work in or about improving, preserving, operating the said property or mill, or for or about any property in which the said or the defendant has or had any interest whatsoever. And the said defendant, further answering, avers that he and the said W. A. Fredericks are now, and since the day of November, A. D. 1873, have been, the owners of the premises and property in said complaint described, and that on or about the date last aforesaid this defendant leased to his cotenant, W. A. Fredericks, his undivided one-half of the said mill and premises, and that the said Fredericks has held and occupied the same under such lease and agreement from the date aforesaid until about the 6th day of
65 March, A. D. 1875. And the said defendant avers and charges for a further defence to the said action, as well as for cross-complaint or bill therein, that the said mill was contracted and erected, and the material therefor, together with the appurtenances, with the means of the said W. A. Fredericks and the defendant. That the said plaintiff in this action had no estate, real or personal, in her own right or otherwise, and was then and still is the wife of the said W. A. Fredericks, and did not contribute any services whatsoever towards the erection or completion of said mill and premises, and that the said W. A. Fredericks was at the time of the erection and completion of said mill and premises, and ever since has been, and now is, the owner of the same. And

this defendant further answering, avers that at the time of the erection of said mill and the acquiring of the title of the same, and the premises contracted therewith, the said W. A. Fredericks was, ever since, has been, and now is jointly indebted unto this defendant and divers and sundry other persons in large sums of money; that for the purpose of securing the debts and demands of this defendant he commenced his
66 suit in the district court within and for the said county of Gallatin, in the Territory aforesaid, against the said W. A. Fredericks on the 6th day of March, A. D. 1875, and at the same time caused a writ of attachment to be issued from under the hand and seal of the clerk of said court, which said writ was duly served on the said undivided one-half of said mill, fixtures, and appurtenances as the property of the said W. A. Fredericks (a copy of the amended complaint in said cause and writ of attachment is herewith filed and made part of this answer, as Exhibit A and B); that the same is still in full force and effect, and by virtue of said seizure and levy of said writ the said defendant acquired *and became* and now has a lien on the said mill and premises aforesaid to the extent of his said demand; that the said W. A. Fredericks being so indebted as aforesaid, and for the purpose of hindering, delaying, and defrauding defendant and said other creditors out of their just debts and demands as aforesaid, caused a conveyance to be made to the said plaintiff of the said undivided one-half of said mill, premises, and property described in said complaint, and whatever pretended interest or estate shall acquire by virtue of said
67 conveyance had only the effect of vesting in her the naked, legal title to the said undivided one-half of said mill in trust for the sole and exclusive use of her said husband, the said W. A. Fredericks.

And this defendant, further answering, avers *that* the facts to be, that said mortgage executed to the said Caleb Gilbert is and was a part and parcel of the same fraudulent design, combination, and confederacy of the said plaintiff and the said W. A. Fredericks, her said husband, to cover up and place beyond the reach of the creditors of the said W. A. Fredericks the said property mentioned therein; that the said W. A. Fredericks at the date of said pretended conveyance was, ever since has been, and now is wholly insolvent; that the said W. A. Fredericks has remained in the sole and exclusive possession of said mill and premises since the day of November, A. D. 1873, and ever since enjoyed the use, benefits, and profits arising from the same.

And defendant further avers that the said W. A. Fredericks so held and retained the interest of the said defendant in the said mill and premises on such lease until the 6th day of March, A. D. 1875, when
68 the said lease therefor expired and determined; and that on or about the day last above named this defendant demanded of the said W. A. Fredericks, who was then in the possession of his undivided one-half of the said mill and premises, *and unto* the possession jointly with the said W. A. Fredericks *of* the whole of the said premises as a tenant in common *of* the said W. A. Fredericks, but that the said W. A. Fredericks then and there refused to admit the defendant into the joint possession with him of the said mill premises or any part thereof, and refused to allow or admit the defendant into the possession of the same, or any use or enjoyment of the same, or the profits or proceeds thereof, but wholly excludes this defendant from such possession; that the said mill is a flouring mill, and is very valuable for the purposes of grinding grain and producing flour; that there is now and has been since the said date of the exclusion of this defendant from

the said mill an abundance of grain to be ground at said mill, and the use of the same is very valuable.

Wherefore defendant prays that the said W. A. Fredericks be made a party to this suit; that he be required to answer this cross-complaint; that the honorable court may by its judgment and decree declare all pretended deeds and conveyances to the said plaintiff in and to
69 said mill and premises null and void as against this defendant and all other creditors of said W. A. Fredericks; that the said pretended mortgage to the said Gilbert, and all liens against to the demands, liens, and encumbrances of this defendant; that an accounting of all of the proceeds and profits of said mill be had, and that the said plaintiff and her said husband be adjudged to pay defendant all such sums of money as may be found due defendant on the taking of such account; and inasmuch as said mill and premises and property aforesaid cannot be divided in kind without injury to parties and creditors interested therein, defendant prays that the same may be sold in manner and form as prescribed by law, and that the proceeds of said sale be brought into court to await the order of distribution thereof, and for such other relief as shall be agreeable to equity.

WORD AND SPRATT,
CHUMASERO & CHADWICK, &
A. M. WOOLFOLK,
Att'ys for Defendant Davis.

TERRITORY OF MONTANA,
County of Gallatin, ss:

Andrew J. Davis, being duly sworn, says he has heard the foregoing amended answer read and knows the contents thereof; that the
70 matters therein stated of his own knowledge therein set forth on information he believes to be true; that he is one of the above-named defendants.

A. J. DAVIS.

Subscribed and sworn to before me this 14th day of May, 1877.

THEO. MUFFLY,
Clerk.

Filed with the leave of court on payment of costs May 14th, A. D. 1877.

THEO. MUFFLY,
Clerk.

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS, CALEB GILBERT, AND Wellington A. Fredericks, defendants.

Now comes the above-named plaintiff and demurs to all that portion of the answer and cross-complaint averring fraud and averring a lien upon said property by virtue of an attachment inspired by said Andrew J. Davis against the property of Wellington A. Fredericks.

71 1st. Said averments constitute no defense to plaintiff's cause of action.

2. The said averments are redundant and immaterial.

JOHNSTON & TOOLE AND
J. H. SHOBER,
Attorney' for Plaintiff.

Filed May 14th, 1877. Theo. Muffly, clerk.

In the district court, first judicial district, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS ET AL., DEFENDANTS.

Now comes the plaintiff in the above-entitled cause and for answer to the cross-complaint and new matter set up by defendant Davis in his pleading denies each and every allegation therein contained, generally and specifically; and the said plaintiff specially and specifically denies any and all fraud or collusion, and avers that she is seized and possessed of the property claimed by her in her complaint in this cause and asks that her title thereto be adjudicated and determined herein, and that she have the relief demanded in her complaint.

J. H. SHOBER & JOHNSTON & TOOLE,
Att'ys for Plaintiff.

72 TERRITORY OF MONTANA,
County of Gallatin, ss:

Sarah J. Fredericks, plaintiff, makes oath and says that the matters and facts as stated in the foregoing pleading are true of her own knowledge.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this May 14th, A. D. 1877.

J. H. SHOBER,
Notary Public, M. T.

Filed May 14th, 1877. Theo. Muffly, clerk.

Affidavit.

In the district court, 1st judicial district, in and for Gallatin County, Montana Territory.

ANDREW J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

COUNTY OF GALLATIN,
Territory of Montana, ss:

Sarah J. Fredericks, a sole trader and doing business in her own name as such sole trader, being duly sworn deposes and says that she is and was at the time of the levy of the attachment in the above-
73 entitled cause the owner of and entitled to the possession of the following described personal property attached in said cause, to wit: eighty-two sacks XXX (triple X) flour of the Willow Creek flouring mill brand; a quantity of wheat (in a pile) containing about (70) seventy bushels; five hundred feet of pine lumber, and the tools and other personal property in the building owned by her; and that the said defendant has not now, nor had he at the time of such levy, any interest in said personal property or any part of it, and further affiant says not.

SARAH J. FREDERICKS.

Subscribed and sworn to before me this 20th day of March, A. D. 1875.

G. L. DUKE,
A Justice of the Peace in and for Gallatin County, Montana Territory.

To C. L. CLARK,
Sheriff of Gallatin Co., M. T.

Please take notice that I claim the personal property mentioned in the affidavit hereunto annexed and served, and require you to deliver the same to me.

SARAH J. FREDERICKS.

LOWER WILLOW CREEK, GALLATIN COUNTY, M. T.,
March 20th, 1875.

74 *Affidavit of ownership.*

In the district court of the 1st judicial district of the Territory of Montana, in and for Gallatin County.

SARAH J. FREDERICKS
vs.
C. L. CLARK, SHERIFF OF GALLATIN COUNTY, M. T.

SARAH J. FREDERICKS, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. I am the owner of and lawfully entitled to the possession of the following described personal property, to wit: Two hundred and eighty-two sacks of XXX (triple X) flour made at the Willow Creek flouring mill and branded with the brand of said mill, one hundred and seven bushels of wheat, and five hundred feet of pine lumber.

3. That the said property is in the possession of and is wrongfully detained by the defendant in the said action.

4. That the alleged cause of detention of said property, according to my knowledge and information, is the following, to wit: Said defendant attached said property on the 8th day of March, 1875, as the
75 property of W. A. Fredericks.

5. That said property has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or an attachment against my property.

6. And that the actual value of the said property is two thousand two hundred and thirteen dollars, as follows, to wit: 282 sacks of flour, at $7.00 per sack, is $1,954.00; 107 bushels of wheat, at $2.00 per bushel, is $214.00; and 500 feet of pine lumber, at 5 cents per foot, is $25.00.

(Signed) SARAH J. FREDERICKS.

Subscribed and sworn to before me this 1st day of April, A. D. 1875.

(Signed) D. H. KEITHAM,
A Justice of the Peace in and for the County of Gallatin, Montana Territory.

TERRITORY OF MONTANA,
County of Gallatin, ss:

To the coroner of the county of Gallatin, M. T.

You are required to take from the defendant, C. L. Clark, the property described in the above affidavit, and to deliver it to the plaintiff.

(Signed) J. H. D. STREET & JOHNSTON & TOOLE,
Attorneys for Plaintiff.

76 I certify that the above is a true copy of the affidavit.

A. D. McPHERSON,
Coroner of Gallatin County, M. T.

Dated this fifth day of April, A. D. 1875.

Register's receipt.

Received, land-office, Helena, M. T., April the 11th, 1870, of A. J. Davis, one hundred and fifty-five dollars, in full of costs and expenses taxed against A. J. Davis and W. A. Fredericks in the contested case of W. A. Fredericks, applicant, against Jarvis Aiken, Wm. Y. Cadman, and A. J. Davis, in this office, the above being the costs due to register and receiver in said case.

L. B. LYMAN, *Register.*

Receipt of Arick.

Received, Helena, M. T., June 7, 1870, of A. J. Davis, fifty dollars, on account for services rendered W. A. Fredericks in his application for homestead entry.

R. E. ARICK.

Account of Arick.

A. J. Davis to R. E. Arick, dr.

To assumption on account of Fredericks' land case	$50 00
For services in case of application for remission of int. rev. tax	$25 00
To assumption on account of case of W. R. Reel, land	
77 suit	$100 00
To services in case of remission banker's license	$25 00
To drawing demurrer and copy in sample case	$10 00
	$210 00

Received payment in full, Aug. 4, 1871.

R. E. ARICK.

A. J. Davis has advanced to me this day, August 4th, one hundred dollars, which I agree to repay in services as attorney for him.

(Signed) R. E. ARICK.

W. A. Fredericks in account with A. J. Davis, dr.

1866.			
Nov. 1.	To	amount paid Judge Hall, of Deer Lodge	$42 00
" 5.	"	9 plugs tobacco	5 40
1877.			
Jan'y 14.	"	2 lbs. candles	1 00
Feb'y 16.	"	¾ tea, per Shelby	1 87
M'ch 7.	"	1 paper soda	50
" "	"	1 sett fanning-mill irons	30 00
Ap'l 20.	"	20 cable chains, $5,00 ea	100 00
29.	"	chickens	10 00
"	"	1 paper tacks, 50; 1 gro. screws, 3.00	3 50
	"	47 bushels wheat, per Jones, 2.00	94 00

Sept.	29.	"	paid Clark, of Sterling, for bolting cloth	72	00
		"	118½ # plow steel, 50 c	59	50
	Oct.	10. "	1 cook stove	75	00
78			1 lot dishes	30	00
			1 set blacksmith tools	350	00
Oct.	24.	To	paid Warren Allen	40	70
'68.					
Jan'y	1.	To	cash paid for Fredericks on mill suit to date	721	00
July	4.	"	cash	25	00
"	"	"	expense to Bozeman on his business	15	00
"	8.	"	paid for goods in Helena	59	60
"	15.	"	cash	50	00
"		"	paid expenses in Helena for Fridley, witness	106	00
Aug.	3.	"	" Street and Edwards	320	00
"	"	"	cash	50	00
"		"	paid his expenses to Virginia	40	00
Sept.	16.	"	gold dust	20	00
	22.	"	" "	60	00
		"	currency	15	00
	25.	"	paid King & Gillette	18	25
	"	"	cash	20	00
	30.	"	"	50	00
Oct.	28.	"	paid Edwards	25	00
Nov.	3.	"	paid for him in Deer Lodge	110	00
		"	cash	60	00
	5.	"	paid Edwards	20	00
		"	paid Parrott & Chadwick	100	00
		"	R. P. Vivion	100	00
79			cash paid Edwards	50	00
			bill at Germain's	151	00
			his stable bill	36	00
			his expenses to and from Helena	40	00
			paid Thoroughman and Davis	150	00
		To	paid his portion of Gallatin transcript	46	00
			" transcript to supreme court	150	00
			" expenses to Virginia	14	00
1869.					
Jan'y	10.	To	3 oz. gold dust	54	00
	"	"	paid McCormick's bill of groceries	66	00
	"	"	" " " "	25	02
	15.	"	" " " "	33	25
	20.	"	cash	20	00
			paid Myers for butter	6	20
Feb'y	26.		" Albaugh case	46	20
			" Col. Stafford's fees	130	00
Mc'h	22.		" McCormick's bill of iron & gro	84	73
	28.		" " "	64	80
Ap'l	25.	To	cash	100	00
		"	p'd Street on trip to Helena	64	00
		"	Drew	20	00
	29.	"	paid cash to self at Helena	12	00
		"	" to Wiel	5	00
		"	cash in Helena	35	00
80	July	7.	To paid McCormick bill of groceries	42	20
		8.	" cash	40	00
Sept.	4.		do.	20	00

	10.	Cash paid McCormick for goods	43 25
	24.	" " " " "	64 00
Nov.	5.	" " " " "	73 39
	25.	Cash	10 00
		To Lyman's fees at land office	25 00
Dec.	5.	" cash for wood	5 00
		" " " wagon	25 00
	25.	" " " goods at Helena	40 00
		87 sacks of flour charged to me, but not received, in Wilson's care, $10.00	870 00
Jan'y	10.	To bill of goods per McCormick	71 35
Ap'l	19.	" " " " " "	8 10
May	19.	" " " " " "	24 78
June	8.	" " " " " "	42 50
July	10.	" " " " " "	8 75
Aug.	9.	" bill of iron	54 63
		" horse nails	8 75
Sept.	5.	" bill from McCormick	66 75
Oct.	3	" " " "	34 90
		" 4 half bushels used or sold	8 00
		" 1 saddle & bridle per self	30 00
81		To bill of lumber from Wa	387 00
		" 2 kegs nails	40 00
		" one large store lock	6 00
		" 1 Sibley tent	40 00
		" 1 cook stove from Radersburg	20 00
		" 1 bbl. whiskey used and sold, 40 gal., $6	240 00
		" plows, wagons, & stock not accounted for	300 00
		" cash paid Lyman, land office	155 00
		" " pd. Toole for attending his case	200 00
		" " " R. Arick for assisting	100 00
	1873.		
M'ch	13.	To cash	15 00
Ap'l	23.	" 2 wagon tires, 150#, 10	15 00
		" 1 chain & cutter	6 00
	23.	" cash	10 00
		" do	20 00
		" paid Clark, Conrad & Curtin	36 20
		" " S. M. Hall for gro. bill	32 35
		" 2 horses	200 00
May	31.	" cash paid lady	10 00
July	2.	" " " Lyman	10 00
	21.	" 20# 4 qsa. nails, 14	2 80
		" 1 gro., 1½ in screws	2 50
		" 1 " 2 " "	3 00
		Cash paid Clark, Conrad & Curtin	22 50
82	July	25. Paid John Bothwell	38 80
	Aug.	12. To 4 bars of iron, 36 in 12½	4 50
Sept.	11.	To paid wife	5 00
Oct.	1.	" " Lavenburg, per lady	20 00
		" 1 p's yal. iron, 38 to 30	11 40
	13.	" paid to Sands	20 65
	16.	" ½ half proff stall	36 50
		" 1 doz. mill picks	23 00
		" 48 feet screening, 50	24 00

Feb'y 7.	" cash pd. Clark, Conrad & Curtin	15	25
" "	" " " " " " old bill	9	39
1875.			
M'ch 1.	" amount as near as possible to ascertain of sale of plows, picks, wagons, &c	250	00
	To house and shop rent to date from August 1, 1868, to March 1, 1875	1,580	00
	To 1 side-saddle	35	00
	" 1 horse	60	00
	" 1 carpet	45	00
	" 1 stove for sitting-room	35	00

Received copy of above this Oct. 24, 1877.

TOOLE & JOHNSON, &
J. H. SHOBER,
Att'ys for Defendant.

CREDIT.

1866.			
	May 8. By 1 sash & 1 plow-stock	11	00
83	May 8. By cash balc. of paying Mrs. Fredericks	119	00
1867.			
M'ch 7.	To 5⅝ candles, 50c	2	50
July 28.	" keeping hogs to date	20	00
Sept. 25.	" balc. on settlement with Jones	29	64
29.	" cash	37	00
1868.			
Aug. 1.	By balc. on hand after paying ex. Mrs. F	273	75
	By one-half of am't collected from Ault by Gy	470	00
1873.			
Feb'y 25.	" 22 days' work at foundry, 3	66	00
M'ch 31.	26 " " " " 3	78	00
May 1.	21½ " " " " 3	61	50
	difference in balc. on scales	6	90

Receipt.

GALLATIN CITY, *Sept. 13th*, 1869.

Received of W. A. Fredericks fourteen hundred and fifteen dollars and thirty-eight cents, being in full of the within claims and all demands to date.

A. J. DAVIS.

Drew receipt.

GALLATIN CITY, M. T., *Sept.* 11, 1868.

W. H. DREW, Esq.:

D'R SIR: The note which I hold against you and W. A. Fredericks is paid, and I shall not hold you further answerable for said amount.

(Signed) A. J. DAVIS.

84 A true copy of receipt from A. J. Davis to Drew.

Agreement, Davis and Fredericks.

HELENA, *Nov. 14th*, 1873.

Memorandum of agreement made and entered into this day between

A. J. Davis and W. A. Fredericks. Said Davis has this day leased his one undivided half of mill on Willow Creek, in the county of Gallatin, Montana Territory for the full term of one year from this date, and the said Fredericks on his part agrees to deliver or store, as per option of said Davis, one-fourth of the gross earnings of the entire mill, including wheat, bran, and screenings, and at whatever time said Davis may require the same ground, to grind the same free of charge to said Davis, by said Davis furnishing sacks for same. Said Fredericks is to be at all expense of running said mill and keeping the establishment in repair.

A. J. DAVIS.
W. A. FREDERICKS.

Deed from Davis to Drew & Mrs. F.

GALLATIN COUNTY, *July 1st*, 1871.

I have this day sold unto Wm. H. Drew and Sarah J. Fred-
85 ericks a certain mill near Bozeman, known as the Ault mill, for and in consideration of the sum of two thousand dollars to me paid, and in consideration of said amount do hereby transfer all of my right, title, and interest in and to said property to said Drew and Fredericks, with all the privileges and appurtenances thereunto belonging, including flume, &c., &c.; and I do hereby warrant and defend the above from and against all persons claiming through or by me up to this date.

A. J. DAVIS.

Toole & Toole account.

Col. A. J. Davis in a/c with Toole & Toole.

To trial tax question Co. com'rs	50 00
" counsel points in agreement land office case, Hot Springs	50 00
" 6 days' trial & argument, Fredericks' case, land office	200 00
" assignment note & mortgage, Everts	10 00
" bill, decree, &c., vs. Germain	150 00
" " " " sample	200 00
" trial &c., vs. Hendrie, D. C	100 00
" " " " " sup. ct	100 00
R. boulder bridge, Mc	20 00
To trial & ex. authorities on decree, self vs. Church, C. & C	100 00
86 To 2 com'pl'ts in replevin cases, cattle & counsel, &c.	50 00
1870 to date (to foot)	$1,030 00

CREDIT.

By cash, $500. By cash, $350.00	$850
Balc. due	180 00
Cr. by reduction this day made	180 00

The above comprises a full settlement of accounts to this date, Sept. 9th, 1874.

TOOLE & TOOLE AND,
E. W. TOOLE.

HELENA, *January 27th*, '75.

Mrs. SARAH J. FREDERICKS:

I received yours of the 14th inst. a few days since; you seem to talk a little more rational. You say you wish to do what is right, and, if so, bring Mr. Fredericks over with you; there will be no trouble settling everything up. After our matters are settled up, I will then make a proposition to buy or sell, to your satisfaction. Satisfied that I could not run the mill to your satisfaction, and I know you could not to mine. Anything that we cannot agree upon we will refer it to parties that are fully conversant with the matter referred, and abide their decision. I think there will be but a few points,
87 and possibly not any, but what we can settle without arbitration, but should there be, and if we both desire to be just and fair, we certainly will be willing to submit it to the judgment of persons who are disinterested and have a full knowledge of the matter. I have a memorandum of all the matters that was talked over at your place and seemed at that time satisfactory. If you are disposed to act right you will find me always ready to meet you upon those grounds. I regret to learn of your bad health, and hope ere this you have quite recovered. If you will write me and let me know when you will be over, so that I will be here to meet you, I will be much obliged. There will be no use of your coming over unless he come' with you. If you are both here, I think there will be no trouble whatever.

Yours, truly,

A. J. DAVIS.

HELENA, *Dec. 19th*, 1874.

W. H. DREW:

On my return I found letter from you stating that you had forgotten the very thing you had come all the way over here to ascertain, and inquire again what you can depend upon for the coming season. When
88 you left here you were to go home and gather up the remaining cattle, sell them, and pay as far as they will go on the note. You were to go on and manage the farm and mill as best you could; that you were to have the balance of my logs sawed up and stacked up with my lumber at the mill; it matters not to me whether you rent the farm and mill or not; all is, I want you to pay as fast as you can, and as long as I am satisfied that you are acting in good faith I do not propose to distress you; all these facts I stated to you when here, and also you promised me the balance due on the June note at the time. I stated to you when here that I did not wish to sell the interest in my mill at Willow Creek, and I now state to you that I have no particular business for you at Willow Creek, save seeing that the dam is completed as per our contract, together with what the court requires. You are also very forgetful; I fear that you would be an unsafe man to intrust business with. Indeed, sir, I should fear that you would recollect more than was said to you. For these reasons I shall de-
89 cline to call upon you to attend to any business for me. I shall soon put a man at Willow Creek to look after my interest at that place.

Yours, truly,

A. J. DAVIS.

HELENA, *May 4th*, 1873.

W. H. DREW:

D'R SIR: It is now past the first of May, and the balance on that note is not paid. I am very much in need of money and hope you will

remit the balance, or at least a part of it, on the rest of this note. Fredericks started over to Gallatin last week; probably he is at your place before this; he took over the pinion to your saw-mill. Net Perkins wrote me some time since, desiring to sell me his interest in the judge. in the mill case, and for me to credit you with the amount; the arrangement would not suit me at this time. I hope that you will get the mill up soon on Willow Creek. I will assure you that it is pretty hard on me if I am obliged to lay out of the use of the money invested in machinery much longer; four or five thousand dollars laying idle simply in consequence of you not getting the mill up is no small
90 item; one-half of the profits of a flouring mill will amount to something, and you should hurry up your cakes, for I cannot stand such losses much longer. From present appearances, I have lost the interest on the investment for one year, which of course you would properly be held answerable for, but if you push it now with energy you can make more reasonable terms with me in the end than you can if you still treat the matter with so much independence. I cannot see, friend Drew, why you should be so slack and indifferent in your business. I have always looked upon you as one of our most prompt and energetic men.

You certainly have a plenty of property that you can convert into money and put through all that you have undertaken. I rely in the matter solely upon you, and will expect for you to put your shoulder to the wheel and go ahead.

Yours, &c.

A. J. DAVIS.

91 *Agreement.*

Memorandum of agreement made and entered into this day between A. J. Davis and W. H. Drew: Said Davis agrees to furnish machinery necessary for a flouring mill, to be located on Willow Creek, in the county of Gallatin, in the Territory of Montana, such as water-wheel, 1 p'ts of four-foot mill burs, smut-mill, oat separator, shafting gearing, belting, bolting-cloth, &c.; or, in other words, such machinery as is usually furnished by a tan'y and mill furnishing establishment for flouring-mills, all of which is to be delivered to the mill location on Willow Creek. Said Drew, on his part, agrees to furnish all material for a suitable mill building, and be at all expense of putting up the same and finishing the same in a substantial and workmanlike manner. He further agrees to furnish material and put up at his own expense all necessary machinery, together with the machinery which said Davis is to furnish, in a substantial and workmanlike manner. Said Drew is to put in and furnish material, at his own expense, for a good and sufficient dam across Willow Creek, to be built in a permanent and substantial manner, with tubes and gates upon said dam to be of a
92 sufficient height to give sufficient power or head to propel all of the machinery in said mill to its full capacity. Said Drew agrees to do all other work in like manner that is or may be necessary to complete the grounds or mill, such as digging race, walling the same, digging the mill pit and walling the same, and securing anything connected with mill or machinery, so that the entire mill and all the parts connected therewith may be substantial and permanent, and all parts connected with machinery, and all machinery put in complete running order, ready to start to business in a permanent manner. Now, it is agreed that after each party has performed his portion of the con-

tract, as herein stipulated; that the said mill, mill site, and all the land belonging to the mill tract, not to exceed 160 acres, shall be owned and held jointly, each party being entitled to one undivided half interest of mill, mill-site, land, and that all expenses in perfecting title to land shall be borne equally and jointly. It is further agreed that after the completion of this mill, as per terms of this contract, that said Drew, on his part, should leave unpaid for labor or material furnished, that may have been used in mill, or in construction with said enter-
93 prise, that his interest shall be held liable for all such debts until the same shall be satisfied by such Drew.

A. J. DAVIS.
W. H. DREW.

BOZEMAN, *July 30th*, 1872.

Endorsement on the above:

Received for record November 17th, 1873, at 8 a. m., and recorded in Vol. I of deeds, at page 387. Fees $2.50.

[COUNTY SEAL.] ARCH. GRAHAM, *Recorder.*

Filed Nov. 1st, 1877. Theo. Muffly, clerk.

Complaint.

In the district court, first judicial district, Territory of Montana, county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The plaintiff complains of the above-named defendant, and alleges:

That heretofore, to wit, on the 14th day of November, 1873, at the county of Gallatin, in the Territory of Montana, the said plaintiff was the owner and in the possession of an undivided half of a certain
94 flouring mill situated on Willow Creek, in said county and Territory. That on the day and date last aforesaid the said plaintiff, by contract in writing, leased the said undivided half of said mill and premises to the said defendant for the period of one year from said date, which said written contract was duly signed by said defendant; that by the terms of said contract the said defendant, in consideration of said lease, undertook, promised, and agreed to pay and deliver to said plaintiff the one-fourth of the gross earnings of the said mill and premises, including wheat, bran, and screanings, that the said defendant, under said contract, took possession of said half of said mill and premises, and has used and occupied the same from said 14th day of November, A. D. 1873, until the present time. That the gross earnings of said mill and premises during the time aforesaid are and have been, in grain, flour, bran, shorts, and screanings, of the value of ten thousand dollars. That one-fourth of the said gross earnings of said mill are and have been of the value of two thousand five hundred dollars, that the the said one-fourth of the gross earnings of said mill are now due to plaintiff; that heretofore, to wit, on the 5th day of March,
95 1875, at the said county of Gallatin, the said plaintiff demanded from the said defendant the payment and delivery to him of the said one-fourth of the earnings (gross) of said mill as aforesaid, but to pay or deliver the same or any part thereof, the said defendant has wholly failed, and still fails and refuses to pay or deliver the same

or any part thereof, and that the whole of said ¼ of said gross earnings is now due and remains unpaid.

Wherefore the plaintiff prays judgment against the said defendant for said sum of twenty-five hundred dollars and costs of suit.

TH. R. EDWARDS,
Att'y for Plaintiff.

A. J. Davis, the above-named plaintiff, makes oath and says that he has heard read the foregoing complaint, and that the facts as therein stated are true of his own knowledge.

A. J. DAVIS.

Sworn to before me, this the 6th day of March, 1875.

W. F. DAVIS, *Clerk.*

Summons.

In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

96 A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

Action brought in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and said complaint filed in said county of Gallatin in the office of the clerk of said district court.

The people of the Territory of Montana send greeting to W. A. Fredericks, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and answer to the complaint filed herein, within ten days (exclusively of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover the sum of twenty-five hundred dollars for money due for rent on premises, and you are hereby
97 notified that if you fail to appear and answer the said complaint as above required the said plaintiff will take judgment by default against you for the relief demanded in his said complaint.

Given under my hand and the seal of the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, this sixth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

W. F. DAVIS, *Clerk.*

Affidavit.

Dist. court of 1st judicial district, Gallatin County and Montana Territory.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

A. J. Davis, the above-named plaintiff, makes oath and says tha

the defendant is justly indebted to the plaintiff in the sum of twenty-five hundred dollars upon an express contract for the payment of money now due, and which is not secured by any mortgage or
98 pledge upon real or personal property; said indebtedness is based upon a written promise to pay rent for the use and occupation of certain mill property upon Willow Creek, in said county and Territory.

A. J. DAVIS.

Subscribed and sworn to before me, this 6th day of March, 1875.
W. F. DAVIS, *Clerk.*

Writ of attachment.

In the district court of the 1st judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS, DEFENDANT.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above-entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, by the plaintiff in the said action, to recover from the defendant, W. A. Fredericks, in the said action, the sum of $2,500.00 dollars, lawful money of the United States, besides interest, at the rate of per cent. per from the day of , A. D. 187 , and costs of suit; and the necessary affidavit and under-
99 taking herein having been filed as required by law: Now, therefore, we do command you, the said sheriff, that you attach and safely keep all the property of the said defendant, W. A. Fredericks, within your said county not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant give you security, by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service and return.

SEAL OF THE GALL. DIST. COURT OF M. T. Witness Hon. F. G. Servis, judge of the said district court of the first judicial district, this 6th day of March, A. D. 1875. Attest my hand and the seal of said court, the day and year last above written.

W. F. DAVIS, *Clerk.*

Sheriff's return.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory, hereby certify and return that, by virtue of the writ of attachment
100 hereunto appended, I did, on the 8th day of March, 1875, levy upon, as the property of the said defendant, W. A. Fredericks, the following property, to wit:

The one equal and undivided half of the Willow Creek grist or flouring mill, situate on Willow Creek, on section number seven (7),

township numbered one (1) south, of range numbered one (1) east, of the lands granted to the North. Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tenements, hereditaments, and appurtenances, as well as the one-half of all the mill-dams, races, flumes, fixtures, and machinery thereunto belonging or in any wise appertaining; also 498 sacks of flour; a quantity of wheat, bran, shorts; and all the tools and other property in the building claimed or owned by the said defendant; also a pile of lumber, 500 feet, more or less, lying close to the mill; also the frame dwelling house situate and being in Gallatin City, Gallatin County, together with the land upon which said house is situated; and the log house occupied by J. H. D. Street; and all other improvements upon said land claimed and owned by said defendant, W. A. Fredericks.

101 Witness my hand, this the 9th day of March, A. D. 1875.
(Signed) C. L. CLARK, *Sheriff.*

List of property attached by virtue of the writ of attachment hereunto appended: One blacksmith forge, one bellows, one anvil, one vice, two screw plates, hammers, tongs, coal, chisels, one hand-saw, blacksmith chest, one diamond plow, thirty bushels of charcoal, more or less, one lot of horseshoes (new), and lot of iron, and one dirt scraper.

Witness my hand, this the 20th day of March, 1875.

C. L. CLARK,
Sheriff of Gallatin County, M. T.

Complaint.

In the district court, 1st judicial dist., Gall. Co., M. T.

TERRITORY OF MONTANA,
County of Gallatin:

ANDREW J. DAVIS, PLAINTIFF,
vs.
WELLINGTON A. FREDERICKS AND WILLIAM H. DREW, defendants.

Plaintiff complains of the above-named defendants, and alleges:

That heretofore, to wit, on the 12th day of March, A. D. 1868, at the county of Gallatin, in the Territory of Montana, the said defendants made, executed, and delivered to plaintiff their certain

102 promissory note, which is in the words and figures following, to wit:

GALLATIN CITY, M. T., *M'ch* 12, 1868.

27½ oz., 5 pwts., & 14 grs.

On or before the 1st day of July next, we or either of us promise to pay to A. J. Davis the sum of (27½ oz.) twenty-seven and a half ounces, 5 pennyweights, and (14 grs.) fourteen grains of gold dust, bearing interest at the rate of five per cent. per month from date until paid, for value received of him, this 12th day of March, A. D. 1868.

(Signed) W. A. FREDERICKS.
" W. H. DREW.

Whereby the said defendants undertook, promised, and agreed to pay plaintiff, on or before the first day of July, 1868, the said sum of

27½ ozs., 5 pwts. and 14 grains of gold dust, with interest thereon from date until paid at the rate of five per cent. per month, for value received; that at the maturity of said promissory note the gold dust due thereon was of the value of twenty-five dollars per ounce; plaintiff avers that at divers times prior to the bringing of this suit in the said Ter-
103 ritory of Montana, and particularly in the month of December, A. D. 1874, at said county of Gallatin, in the Territory aforesaid, the said plaintiff demanded from the said defendants the payment and delivery to him of the gold dust due on said note, with interest, but to pay the same or any part thereof the said defendants then and there failed and refused, and still fail and refuse to pay the same. That there is due now and unpaid on said note, including interest, the sum of thirty-five hundred and seventy-two dollars, for which sum and for costs of suit plaintiff prays judgment.

TH. R. EDWARDS,
Att'y for Plaintiff.

A. J. Davis, above-named plaintiff, makes oath and says that he has heard read the foregoing complaint, and that the facts as therein stated are true of his own knowledge.

A. J. DAVIS.

Sworn to before me, this 6th day of March, 1875.

W. F. DAVIS, *Clerk.*

Summons.

In the district court of the first judicial district of the Territory of Montana, in & for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
versus
104 W. A. FREDERICKS AND W. H. DREW, defendants.

Action brought in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and the complaint filed in said county of Gallatin, in the office of the clerk of said district court.

The people of the Territory of Montana send greeting to W. A. Fredericks and W. H. Drew, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

This action is brought to recover of said defendant the sum of three thousand five hundred and seventy-two dollars upon a promissory note executed to plaintiff by said defendants, W. A. Fredericks
105 and W. H. Drew, dated March 12th, 1868, drawing interest at the rate of five per cent. per month, and given for twenty-seven and one-half ounces, five pennyweights, and eighteen grains of gold dust; and you are hereby notified that if you fail to appear and answer

the said complaint as above required the said plaintiff will take judgment by default against you for the relief demanded in his said complaint.

Given under my hand and the seal of the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

{SEAL OF DIST. C'T 1ST JUD. DISTRICT, GALLATIN COUNTY, MONTANA TERRITORY.}

W. F. DAVIS, *Clerk.*

Affidavit.

In the district court of the 1st judicial district, Gallatin County, Montana Territory.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS AND W. H. DREW, DEFENDANTS.

A. J. Davis, the above-named plaintiff, makes oath and says
106 that defendants are justly indebted to him upon express contract for the payment of money now due, and which is not secured by a mortgage, lien, or pledge upon real or personal property. Said indebtedness is based upon a promissory note for the payment of gold dust, and interest at the rate of five per cent. per month from date of said note until paid.

A. J. DAVIS.

Subscribed and sworn to before me, this March 6th, A. D. 1875.
W. F. DAVIS, *Clerk.*

Writ of attachment.

In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

A. J. DAVIS, PLAINTIFF,
vs.
W. A. FREDERICKS AND W. H. DREW, DEFENDANTS. } Writ of attachment.

The people of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas the above-entitled action was commenced in the district court of the first judicial district of the Territory of Montana, in and for the said county of Gallatin, by the plaintiff in said action, to recover from the defendants, W. A. Fredericks and W. H. Drew, in the said action the sum of ($3,572.00) dollars, lawful money of the
107 United States, besides interest at the rate of per cent. per , from the day of , A. D. 187 , and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law: Now we do, therefore, command you, the said sheriff, that you attach and safely keep all the property of said defendants, Fredericks and Drew, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said

plaintiff's demands as above mentioned, unless the said defendants give you security, by an undertaking of at least two sufficient securities, in an amount sufficient to satisfy such demand, besides costs, in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service and return.

Witness Hon. F. G. Servis, judge of the said district court of the first judicial district, this sixth day of March, A. D. 1875.

Attest my hand and the seal of said court, the day and year last above written.

W. F. DAVIS, *Clerk.*

Sheriff's return.

I, C. L. Clark, sheriff of Gallatin County, Montana Territory,
108 hereby certify and return that by virtue of the writ of attachment hereunto appended I did, on the 8th day of March, 1875, in Gallatin County, levy upon as the property of the said defendant W. A. Fredericks the following-described property, to wit: The one equal and undivided half of the Willow Creek grist or flouring mill, situated on Willow Creek, on section numbered seven (7), township numbered one (1) south, of range numbered one (1) east, of the lands granted to the North Pacific Railroad Company by the United States, together with the equal one-half of all and singular the tenements, hereditaments, and appurtenances, as well as the one-half of all the mill-dams, races, flumes, fixtures, and machinery thereunto belonging or in any wise appertaining; also 498 sacks flour, a quantity of wheat, shorts, bran, and all the tools and other property in the building, claimed and owned by the said defendant; also 500 feet lumber lying close to the mill; also the frame dwelling-house, situated and being in Gallatin City, Gallatin County, together with the lands upon which house is situated, and the log house now occupied by J. H. D. Street, in Gallatin City, and all other improvements upon said land, claimed and owned by said defendant W. A. Fredericks.

109 Witness my hand this 9th day of March, A. D. 1875.

C. L. CLARK,
Sheriff.

Defendants next offered in evidence letters from Wellington A. Fredericks to the defendant Davis, the hand writing and signatures are admitted to be genuine, which are numbered from (1) one to eighteen (18), inclusive, all numbered in red ink; which said letters, from one to eighteen, inclusive, are in words and figures following, to wit:

GALLATIN CITY, *May 8th*, 1872.

Mr. A. J. DAVIS:

D'R SIR: I have made up my mind to build the mill on Willow Creek. I want you to fetch bolting cloth for 2 reels, 20 feet long, 36 in. diameter, 6 ribs; it wants No. 10 and 11 for the first reel, No. 9 and 10 for the other. I think you have No. 9 enough for ½ of one reel, and fetch one oats' separator and 1 smut mill. I think the California smut mill is the best. You had better get No. 2 machine. I will want 1 run of mill stones. I would rather have 3½ feet stones, but if you are going to fetch out your old mill burs one of them will answer. I would like to know the length of the spindle so as I can fetch a
110 proof-staff and some mill picks, the balance we can get up here. I

will want a lot of 4-inch leather belting. No news of importance. Sarah and the babies is well, and sends respects. Please write soon.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Sep.* 28, 1872.

A. J. DAVIS.

D'R SIR: I have been home all of this week, a rigging up the 4-horse team; will start up to the mill Wednesday or Thursday next; expect to come back by Sunday next with a load of flooring for the house. I think I can fetch enough at one load to lay the lower floors; so, if I can get harness, I will have the lumber down next Sunday. If you have a harness that you can spare, I wish you would send it out. Mr. Galen has some harness here for sale. I was in hopes you could come down this last week. I want to see you in regard to the mill. Drew don't want to go on with his interest, and said he would buy my interest in the saw-mill if I would take my pay in lumber. I have got the mill all framed, and am waiting for teams to move it, but everybody is so busy stacking their grain, that I have been unable to get any of it
111 hauled yet, but I may get some teams soon. Money matters has been so close, that Drew has not been able to send you as much as he expected. He wanted to know if you would wait on him until he could collect; if not, he would have to hire it. J. S. Wilson is waiting to see you in regard to the old mill case. He has failed with his settlement with Thomas. I will expect you up soon.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *October* 16.

A. J. DAVIS.

D'R SIR: I have just returned from the mill with a load of lumber for Willow Creek. Drew says he has not done as well as he expected, and money is so scarce that it is impossible for him to go on with the grist mill, and wants me to take it off his hands, and I don't see how I can put it up this winter alone. What do you think is best to do with it? If you say stop until spring, all right; or if you say go on, I will do all I can with it; or if you want Drew's interest, you can have it. The frame is all ready to raise, and the tools are all ready, and about all of the lumber is out, ready to move. I have got flooring enough here to lay all of the bottom floors in this house, and *map* boards;
112 and if I had the glass and putty and door-hangings, I would get it inclosed. Judge Murphy wants to rent the old house. Answer soon. I will be home Sunday again.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Oct.* 21, 1872.

A. J. DAVIS.

D'R SIR: Yours of the 18th is at hand. I would say, in answer, that I feel determined to go ahead with the mill as fast as I can. It has got to go up. Drew says if he hadn't to pay you that thousand dollars, that he could go on with it, but it is going to crowd him very much to pay you. He said that he was willing to go on with the mill as fast as he can after he pays you; and if I wait for that, it will be next year before he will get around. If I had about one thousand dollars, I think

I could get it about ready to start. I am getting it down as fast as I can. I have got all of the lumber here for the house, and will set it up on the land soon. The time is out on the land, and can be entered as soon as I can get the house up. As for Drew, I don't feel like waiting on him any longer, if there is any other way to go on. He is
113 willing that I shall take the lumber and timber that is got out for the mill, and he will take as much more. I expect I could get another party to take Drew's interest, but I don't want any more partners. The farmers say they will hold as much of their wheat as they can, and if it is not gone on with this winter, we will loose all of this crop. Drew has offered me 75 thousand feet of lumber for my interest in the saw-mill. If I get a chance to sell Coley & Belley and Sam'l Billey, harness, and wagon and take it in *hallns* lumber, is it best or not? I shall start for the mill in the morning. If it was not for the grist-mill, I would come up and help you this winter. If I can make a bargain with Drew for the saw-mill, I believe I will let it go.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Dec.* 11*th*, 1872.

A. J. DAVIS.

D'R SIR: I have been upon Willow to-day; seen a number of the men. They say if I will go ahead with the mill this winter, they will turn out and dig the mill-pit and race and the dam free of charge. I have not given them any answer yet. What do you think about
114 it? Is the mill-stones and smut-mill come yet? I will go to Bozeman to-morrow for a load of lumber; will be home Saturday; would like to hear from you. When I come back, I think I can get two or three carpenters, and pay them in lumber. The worst that would be is in regard grub. I think I can start it in two months after the foundation is laid. If it is put up, it will get all of the wheat on Willow and Lower Willow. They are gon' on Thomas. He about says to Drew, anything to start the mill. Let me know what you think about it.

Y'rs, truly,

W. A. FREDERICKS.

GALLATIN CITY, *Oct.* 28, 1872.

A. J. FREDERICKS (DAVIS?)

I received your letter yesterday. I shall start to-morrow for Bozeman for a load of lumber and then return to Willow Creek; then to Sterling to get a load of your iron. I will be back here from Sterling about next Saturday; I am very buisy in getting the timber down for the mill, but it is getting so late I am afraid I won't get it up this winter. I will come up next week with your load, if nothing happens, and then we will talk the matter over and see what is best to do about matters in general; do you want that band iron in the shop; may be you had better
115 write and tell me what you will need the most. I don't know how I shall manage about money for expenses. I never saw such times to raise money, and I am strapped.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *September* 2, 1872.

Mr. A. J. DAVIS:

D'R SIR: I have received 2 letters from you since I went up to the

mill. I came down home yesterday to see you here. I want to make some more inquiries about that water, what has it got, and in *at* case around the wheel timber to the left, what with the gates in it, or has it got to be put in a wooden scrale. I want to frame the decker to hold the wheel this week. I am somewhat lost to know the power and the speed of that wheel; I have nothing to go by but level book, and I don't think it has the same speed nor power as the lefel wheel; if you can find out anything different from lefel conclusion, let me know, as I want to get my other granary up as soon as possible; give me the size of your fling gudgeon for bolt-shaft and convey *our* shaft. I think you have a pattern that will take a 6½ inch wood, which will be about right. I
116 would like to know the size of your bevel wheels patterns, and I may arrange the machine to suit the patterns. I shall get ready to move down on Willow Creek in 15 days. I want to raise all the teams next week I can. I would like to use Belley and Colley on the *am* if you don't need them. Have you got any patterns for a *ve* friction wheel about 2 feet in diameter. I am sorry Mr. Drew has failed to get you that money. As soon as he told you they had bad luck and broke the big band wheel, which has been a great drawback; he is going to make a draw on government to-day for you. Please answer to Bozeman.

Yours, truly,

W. A. FREDERICKS.

GALLATIN CITY, *December 22d*, 1872.

A. J. DAVIS:

D'R SIR: I have received two letters more from you of late. I have just returned home; the weather is very cold and stormy here. I have got all of my lumber away from the mill that is sawed out, and Mr. Wright has agreed to ha*ll* that as soon as it is cut out. I have about 5,000 feet at Foster's to be dressed, but he is froze up, and I don't know whether I will get that or not. I have 4 loads here to take over on Willow Creek. The weather is very cold and if it continues cold I
117 don't think it is best to do anything towards building the mill this winter. I don't that the parties on Willow Creek will bind themselves to do anything, and if they don't, I shan't do anything this winter. I will know more about it when I go upon Willow again. I don't think Drew intends to have anything to do with the mill than he can help. I have not said anything to him of late about the matter. I have got 35,000 feet of lumber on the way and there, for the mill, and there is about 6,000 feet more to deliver. I have not had time to go and see the men that is owing you, but will see them soon. If the weather is not too stormy, I think I can get ready to come over in about two or three weeks from now. If the weather is cold you can't finish your house. It won't make any difference with us. You can use your old office.

Yours, truly,

W. A. FREDERICKS.

I was over to-day and saw Bangs Well; he said that he had sold 2 cows, and the money was due the first of January, and he would send it as soon as he could; he has not threshed any of his grain yet; the roads have drifted very bad this morning; it has stopped the stages.

GALLATIN CITY, *July 8th*, 1873.

A. J. DAVIS:

118 D'R SIR: I received your letter dated the 2nd. I got those

notices and have put them up. I have just come from the saw-mill. Everything is going on very well well there, except there is no money to buy lumber. Drew says it is impossible to sell lumber and get money; he says that he is sure that he will get a bill of government. He is going to send me 2 mechanics in a few days. I have got 4 teams to start next Monday after lumber; in 3 weeks I will have all of my lumber down. I have got the mill raised, and I think half of the dam is in. Drew says the same about the mill as he did last winter; he don't want any interest in the grist-mill, but will help me all that is in his power.

I want you to send from Clark, Conrad and Curtin one keg of 10^{d} nails; 50 lbs. 5 in. spikes; 30 lbs. No. 6 nails; 20 lbs. No. 4 nails; 50 lbs. 5 in. spikes; 30 lbs. No. ; 1 gross of 1½ in. wood screws; 1 gross 2 in. screws. Send five gallons syrup. There will be a team call at Conrad's for it next Friday. You can get all of the belt-gearing *dody* and the 3 upper lengths of the upright shafting, and leave the lower lengths until the water-wheel comes. You can get the spindle and step, and the stones ready, and send all of the gudgeons for the conveyance and bolts shafts soon. I shall need the gudgeons in
119 3 or 4 weeks. I think I shall make some changes in the shafting in the lower story of the mill, but not until I get the water-wheel down, and that I don't expect for 2 weeks yet.

Yours truly,

W. A. FREDERICKS.

GALLATIN CITY, *September 22d*, 1873.

A. J. DAVIS:

D'R SIR: I received yours of the 8th to-day. You did not say anything about shipping any of that machinery. I am ready to use it all, and I want you to ship it as soon as possible. I have got 5 men at work, and can't work but a few days longer without the balance of the machinery. I expect to get it ready to run the last of October. Do you want Mood to start the mill, if he can be got. John Emmerson is here and can be got. I wrote you some 2 weeks ago about the elevator belts; they should be 4½ in. wide or 5 inches, to use those elevator-cups, and I can't put up my elevator-spouts until I know the width of the belt. I sent Mr. Simon the affidavit some time since. Write by return mail. If I can raise the money I would like to come in and have that land entered.

Yours truly,

W. A. FREDERICKS.

WILLOW CREEK, *September 7th*, 1873.

A. J. DAVIS:

120 D'R SIR: I will give you the bill of bolting: 250 feet 5 inches wide, leather, or 4½ in. wood*d*en; this bill is for elevators. Please let me know which you will send—let me know soon. 46 feet 3 in., 12 in. wide. This is the stone belt; if you have a No. 1 leather belt you can send it; if not, send gum. 36 ft. 6 or 10 in. wide; this is to drive the upright bin shafting. This will do as well to be leather or gum. 14 feet, 10 in. wide, other, 18 ft., 6 in. wide, other, ten feet, 4 in. wide leather, ½ side string leather; 2 gro. 2½ copper rivits ⅜ in. long; 1 gro. 2½ in. wood screws; 2 dozen wood-screw bolts, ⅜ di., 4 in. long; 1 dozen do., ½ in. diameter, 6 in. long. You may send all of the machinery as soon as you can. The mill is inclosed, and half of the floors are laid, and a

part of the band-wheels are made. I shall have the water-wheel in this week. I have 2 men now; will have 2 more next week, Tuesday, and shall need everything that belongs to the machinery soon. Send 110 elevator cups.

Yours truly,

W. A. FREDERICKS.

Please tell Clark, Conrad, and Curtin to send me 50 pounds 10^{d} nails, and 50 lbs. 8-penny nails. Send it with one of the first teams that you send out with the machinery. Don't forget to send that piece of galvanized iron to make the stone-curl, 14 feet long, 3 in. wide' than the eye of the stone is deep.

121 WILLOW CREEK, 26*th*, 1873.

A. J. DAVIS:

D'R SIR: I received your letter to-day. You said nothing about that 2 shoes and the bolt of clothing that was on the bill of the last load, and did not come here. Dunphy has paid the men on your letter and they have gone to Corinne. I wrote them a letter at Bozeman; I supposed they would come back for their *becet;* it is possible that you did not send the bolt-cloth that was not made the 2 shares. I don't miss it; must be a mistake in making out the bill; if you have not sent the bolt cloth, I wish you would do so. I can make it up. In examining the roll I see you have not sent any coarse screening for the tail-end of the reel. You will have to send another piece 12 feet long, 16-in. wide. You may send the big belt for the stone. I may have to grind the burs down with sand and will not do it until I get the belt. Send a piece of string leather; I can't get it here. You did not say anything about a mill scales; do you expect to furnish them, or how are they to be got, and the mill has got to have a stove and pipe, which I expect the mill will have to get. I got an answer from Mood; he was to come down to-day,
but did not come. I don't expect I can make a bargain with him;
122 he will want 6 or 7 dollars a day, and that is more than the mill
can earn the way flour is selling. I can get Emmerson for about one-half that Mood will come for; the farmers in general think Emmerson is as good a miller as Mood, and he wants two-thirds of the tail end. I expect Mood will want all, and that won't do. Give me your opinion on the two men. I think if Mood don't come down this week I will let Emmerson go to work on the burs. In regard to your interest I will think of it, and see what I can do. I want to ask you a question: If I settle up my matters with Drew and get the other half of this mill, will you consent to the trade? Now, I have done all that has been done here this summer, and if I had not the way I have, there would have been nothing done. I have worked very hard to get the mill a going, and have had no help from anybody, only the men that Drew sent down, and I expect to pay these, and if you will consent to exchange Drew for me I think I can make the exchange. I don't wan't any trouble on this mill, and I hope it will be all straightened up without any fuss.

W. A. FREDERICKS.

BOZEMAN, *March the* 28*th*, 1874.

Mr. A. J. DAVIS:

123 D'R SIR: I received a letter from you some ten days ago, and you say you had not been over to Willow Creek yet, and did not say whether the mill was finished or not. I would like to know if Fredericks can hold me responsible for his debts that he owes on the mill,

as his wife agreed to pay all of them; if they can, I can make myself safe on some of it. I would like to know what to do. I look to you for advice, for I don't want to pay any more debts of the mill, for I will have all I can do to pay your debt this season. Fred's wife wants me to give her another deed from what I have given. I don't know what it is yet. I will let you know what it is, or will it do to take Edwards' advice on it? If you say that Edwards will do, I will let it go at that. Have you and Fredericks had any trouble about the mill? I have not heard of any, but I thought so by her wanting another deed. I wish you would keep me posted as well as you can, so as I won't get into any trouble. I am cutting logs now so as to have them ready as soon as the water comes, and I am not contracting anything only to pay it in lumber so as I can have the avails of the lumber to pay to you. I will write you again as soon as I find out what Mrs. Fredericks wants, and I would like to have you let me know what to do, as soon as you get
124 my letter. I am at the mill most of the time and don't get a chance to come down once a week.

Yours, truly,

W. H. DREW.

MIDDLE CREEK MILLS, *June 17th*, 1873.

MR. A. J. DAVIS,

D'R SIR: I wrote you some time ago that I would send you some money the first of this month, which was impossible to do. I have been compelled to be at the mill for the last three weeks. The water has been so high it took away my boom, and I lost some 3 or 4 hundred logs, and I had to go below the mill and make another and run in what logs I had banked, then I got another boom ready above the mill and then went down so that I got it in and run in a lot of logs; it dam'ed the creek up so that it run all over around the mill, and I had to watch it night and day, and the creek is falling to-day, and it will take me several days to turn the water out of the road and put one span on my bridge. The mill hasn't run any for three weeks on the account of high water; the creek raised two feet higher this spring than last year. I will have as many logs as I can saw this summer, and it won't cost me more than eight dollars to get the lumber delivered in the yard, and I don't have to pay any money only as lumber is sold for the cash, for any work done. I got a letter from the post to-day to know
125 what I will furnish all the lumber, lath, and shingles for that they may want this summer. I will see them in a few days. As for the grist-mill, I will send as many men as Fredericks says he can use to advantage, as soon as the water goes down so as they can work to advantage. I am as anxious to get the mill started as you are, and am ready to furnish hands or material that is needed. That matter I have looked to Fredericks to see to, and stand ready to fill his orders at any time, but it is necessary for me to attend to the saw-mill in order to be able to pay the expenses between us both. I hope we will be able to get the mill running as soon as you could expect it.

I see by your letter that you think that I do not appreciate your extended favors, which you are very much mistaken; it is my opinion that from the first start that you wanted to help Fredericks and myself get a little start through your kindness. I am satisfied that we will have completed that we have undertaken by the fifteenth of September next. I am very sorry that I have not been able to have paid that note. I know it is right and just that it should have been paid long ago, and I assure you that I am much obliged to you for waiting

126 on me, but I think I will soon be able to settle it up; it has made a great difference with me on the account of the post not using any lumber; the old buildings have all been condemned, and they expect to commence the first of July to build new quarters; if they do, it will require a good deal of lumber, and I am prepared to turn out three thousand feet a day for three months. I am in hopes that I will be able to straighten up things in a short time to your satisfaction.

Yours, truly,

W. H. DREW.

BOZEMAN, *May 1st*, 1874.

Mr. A. J. DAVIS:

D'R SIR: I have just received your letter stating you had been to Willow Creek, but did not find things all right. I wrote to Fred. some time ago about the dam, if it was done, and he wrote me he would have it done by the tenth of May, so as to be sure of high water. As for the balance of the mill, I supposed it was finished. I will write to him and see what he says about it. I am sorry that you did not find your toll all right. I hope there won't be any trouble until you accept of the mill from me. I don't want that woman to make mischief between us. I got to write about those cattle some ten days ago, but have not got any answer yet. I sent my boy over to see him this week, but he has not come back yet. I have paid Edwards fifteen dol-
127 lars. I told him I would pay him the balance as soon as I possibly could get it all. He said he would like it as soon as he could get it. How would you like to trade that note of mine for Fred's interest in the mill or their homestead. I don't know but I could make a trade. I could find out if it would suit you. You spoke of some material being furnished. I would like to have you send me your bill of anything you have furnished that you have against me, so as I may know what to do with Fred., as I settled up all other accounts with you when I was there. The weather has been so bad and men so scarce, I have not started sawing yet. I would like it if you could make a trade for the mill, as it would then avoid all trouble. As for that woman, you know what she is better than I do. As for Fred., he works hard, and if he was in business by himself it would be better. I will write as soon as I hear from Fred.

W. H. DREW.

HAMILTON, *August the 20th*, 1874.

Mr. A. J. DAVIS:

D'R SIR: It has been a long time since I wrote to you. Money is so hard to get that I have not been able to sell anything to get much to send you. I sold ten head of cows to Grannis, and he was to
128 send you the money; and I sold one to-day, and I will send the money when I go to Bozeman. I have quit the mill to cut my grain. I will have enough for bread and seed; it will take about ten days, if it don't rain too much. I have been in hopes that the Jefferson mills would make a market for lumber, but it hain't yet, and I don't see anything that will turn into money this fall. I have not seen Fredericks since you wrote me, but I heard he had the dam up and was running. I wrote to him to give every man a receipt for every lot of grain that was brought into the mill, so as it would agree with the books at the mill. I will go over and see how he is getting along before I go up to the mill again, and will let you know. Now, I would like to

know what you will do with my mortgage—if you will give me more time, and how long. How much lumber would you take, delivered in Bozeman, this fall and next spring, and how much wheat, delivered at the Willow Creek mill, next fall and a year from next fall? If you can give me until next fall, I want to rent out a part of the ranch to put into wheat, and I would like to know right off; or if you don't, and I can rent it out and let the rent go to whoever owns the rent when
129 the grain comes off. I wish you would write soon, and so as I can get to know what I am to do before I go over to the mill; and if there is anything you want I should do about the mill on Willow Creek let me know. Has Fred. paid any of the indebtedness upon the mill this summer?

Yours, truly,

W. H. DREW.

BOZEMAN, *May the 30th*, 1874.

Mr. A. J. DAVIS:

D'R SIR: I received two letters from you to-day stating that you did not feel willing to accom'odate with that amount of money that I asked for, on the account of the security that you had would not warrant it. It is all right, and, further, you will see that I will try to do what is right. Grannis has not come back yet—the man I let have the beef cattle; he was to have been back the 20th of this month. I did not see him. My son sold them to him on the Yellowstone. I told him to sell them at the Mission, but he was one day too late. I found six cows after I gave you the mortgage, and I sold four of them to Grannis for my own use; all the balance is here, except one steer that strayed, but I will try to find him. Grannis said to my son; that when he came back he wanted to buy all of my cows, and I will try
130 and sell to him all of the cattle; if so, I think I can raise 1,000 dollars. I see that you thought that Edwards was not looking after matters, but I told him how it was; he see that I had not molested any of the stock I had turned out. As for that deed of Mrs. Fredericks, I may have done wrong, but you knew how the first deed was, and the last one was worded the same as the first. I asked the recorder to write you a statement to let you know if there was any difference, and he said he would. You have said that Mrs. Fredericks said that I talked about you, and did not think that I would do what I had agreed to if I could help it. If Fred. and his wife will do what is right as near as I do, I will guarantee that there never will be any trouble. You had ought to know what she is by this time, and take her word for what it is worth. I hope this will be satisfactory to you, and that you will feel satisfied that I am not trying to do anything wrong in our matters of deal. As soon as Grannis comes back you will hear from me again.

Yours, truly,

W. H. DREW.

BOZEMAN, *May the 21st*, 1873.

Mr. A. J. DAVIS:

D'R SIR: I received your letter a few days ago, and I have neglected answering it on the account of my family being sick. I have had
131 to be with them the most of the time for three weeks. My wife and myself have had to sit up with them all the time, and they are not much better yet. I was very glad you answered that matter of

Mr. Perkins, for I could not get anything out of him, for he said he could make a turn with you. I don't think I can send you any money before the first of June. I am anxious to pay the balance of that note. I received a letter from Mr. Fredericks last week, that he was at work; he was at work at the mill. I see you are anxious to have it up. I believe that I have done everything that has been required of me. I have furnished what lumber he called for, and paid for hauling, and paid for carpenters to frame it; and the last letter that I got from Fredericks, at Helena was that he could not do anything more until July, as he did not think he could get a title to the land before then, and he would not do anything until he did. There is but very little doing here; just about enough to pay expenses. There is some talk of commencing work at the post soon, and then times will liven up a little. I have managed to pay my way this winter, so as to be ready to put up that mill as soon as it could be, for it has cost me a good deal,
132 and I don't want to be out of money any longer than I can help. What did that wheel cost?

Yours, truly,

W. H. DREW.

This court, sitting as a jury in said cause, proceeded after the close of the testimony to find the facts, which findings are in the words and figures following, to wit:

Findings of facts.

In the first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

This cause coming on for trial this 30th day of October, A. D. 1877, before the court sitting without a jury, and a jury having been expressly waived by the parties plaintiff and defendant, and after the reading of the pleadings, the introduction of evidence, and argument of counsel, and the court being fully advised as to the law and the evidence appertaining to said cause, the court finds the facts in said cause, in writing and filed therein, and that *that* the plaintiff Sarah J. Fredericks was the owner of the property mentioned in the complaint
133 in said cause, as sole trader, and that the defendant Charles L. Clark did wrongfully take of said property, upon writs of attachments issued in said cause at the suits of defendant Andrew J. Davis vs. Wellington A. Fredericks, and Andrew J. Davis versus Wellington A. Fredericks and William H. Drew, from the possession of said plaintiff Sarah J. Fredericks two hundred and ninety-five sacks of flour, and that the value thereof was five dollars and fifty cents per sack, and one hundred and seven bushels of wheat of the value of two dollars per bushel, and of said shingles ten dollars in value, and of said lumber of the value of fifty dollars, in all of the value of eighteen hundred and ninety-six dollars and fifty cents.

The court further finds that said plaintiff Sarah J. Fredericks is entitled, as against said defendants Charles L. Clark and Andrew J.

Davis, to the possession of said property, or the value thereof, to wit, $1,896\frac{50}{100}$.

Now, on motion of Messrs. E. W. Toole and J. H. Shober, attorneys for said plaintiffs, it is ordered and adjudged by the court, that said plaintiff Sarah J. Fredericks do have and recover from said defendants Charles L. Clark and Andrew J. Davis the possession of said property hereinbefore described; and if possession thereof cannot be had,
134 then that said plaintiff do have and recover of said defendants the sum of one thousand eight hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and her costs in this behalf expended, taxed at $374\frac{75}{100}$ *dollars;* and judgment is hereby rendered in favor of said plaintiff Sarah J. Fredericks, and against said defendants Charles L. Clark and Andrew J. Davis, for the possession of said two hundred and ninety-five sacks of flour, and said one hundred and seven bushels of wheat, and said shingles and lumber, in the pleadings herein described; and if delivery cannot be had, then that said plaintiff Sarah J. Fredericks do have and recover of said defendants the sum of eighteen hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and the further sum of $374\frac{75}{100}$ *dollars*, her costs and disbursements in this case expended.

HENRY N. BLAKE,
Judge of said Court.

To which ruling, finding, decision, and judgment of the court the defendants then and there excepted, because the same is contrary to the evidence and against the weight thereof; and that the conclusions of law found therefrom are erroneous, not supported by the proof in said cause, or authorized by the facts so found by the court.

135 That at the same time the defendants submitted findings of facts to said court, and requested him to find in accordance therewith, which said findings are in words and figures following, to wit:

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Defendants submit and ask the court to find the facts as follows:

1st. That plaintiffs are now and have been long prior to January 1st, 1869, husband and wife.

2nd. That on and prior to the said first day of January, A. D. 1869, the said Wellington A. Fredericks was wholly insolvent, and that his insolvency continues to this date.

3. That the said defendant and the said Wellington A. Fredericks had a demand against Ault & Co., who were the owners of a certain saw-mill situated in Gallatin County, Montana Territory. That for the purpose of securing the said indebtedness, the said Ault & Co. executed to the said A. J. Davis a mortgage on said saw-mill and fixtures. That said mortgage was foreclosed, and the said defendant Da-
136 vis became the purchaser thereof at sheriff's sale; that pursuant to said purchase the sheriff of said county executed to defendant Davis a deed for said mill, machinery, & fixtures, the one-half thereof belonging to said Wellington A. Fredericks.

4. That thereafter the said Davis sold his half interest in said mill,

&c., to one Wm. H. Drew, and executed to said Drew a deed for one-half; and at the request of the said Wellington A. Fredericks, and without any consideration, executed a deed to Sarah J. Fredericks for the other half of said saw-mill.

5. That on or about the year 1872 an agreement was entered into between said A. J. Davis, Wellington A. Fredericks, and the said William H. Drew to build and furnish that certain grist and flouring mill to be situated on Willow Creek, in said Gallatin County, and since known as the Willow Creek mills; by the terms of said agreement the said Davis was to furnish the machinery, and they, the said Drew and Fredericks, were to furnish the lumber and to put up the mill and mill-dam.

6. That in pursuance to said agreement the said mill was completed, and the said Davis became the owner of one-half, and the said Drew and W. A. Fredericks became the owners of the other half.

137 7. That in 1874 the said Fredericks exchanged his interest in said saw mill (the title then being held in the name of his said wife, Sarah J. Fredericks) to the said Drew for his (Drew's) interest in the said grist or flouring mill, and thereafter, without any other consideration, caused the said Wm. H. Drew to convey the one-half of said grist-mill or flouring-mill to the said Sarah J. Fredericks, his said wife as aforesaid.

8. That the said Wellington A. Fredericks has, since the completion of said mill in the winter of 1873, possessed, controlled, and managed the said mill.

9. That the flour and the other property attached by the sheriff in March and April, 1875, is the proceed of said mill.

10. That the said conveyance from the said Drew to the said Sarah J. Fredericks is without consideration and void as to the said defendant and other creditors of the said Wellington A. Fredericks, and was so made with the intent to hinder, delay, and defraud said Davis and other creditors.

11. That the flour and other property so attached as aforesaid is the property of the said W. A. Fredericks, and subject to the payment of his debts.

138 12. That the so-called sole tradership of the said Sarah J. Fredericks is and was a trick and device, the better to enable her to cover up and secrete the property of her said husband, and to hold the same thereunder in trust for his use and benefit.

The court refused to find any of the foregoing facts except the numbered 1st, which is incorporated in the finding duly signed.

HENRY N. BLAKE, *Judge.*

Which said findings were refused and rejected by said court. To the ruling of the court in refusing to find in accordance therewith these defendants at the time excepted.

That thereafter the said court, on the 1st day of November, 1877, proceeded to render judgment against these said defendants, which said judgment is in words and figures following, to wit:

Findings and judgment.

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

139 This cause coming on for trial this 30th day of October, A. D. 1877, before the court sitting without a jury, and a jury having been expressly waived by the parties plaintiffs and defendants, and after reading of the pleadings, the introduction of evidence, and argument of counsel, and the court being fully advised as to the law and the evidence appertaining to said cause, the court finds the facts in said cause, in writing and filed therein, and that *that* the plaintiff Sarah J. Fredericks was the owner of the property mentioned in the complaint in said cause, as sole trader, and that the defendant Charles L. Clark did wrongfully take of said property, upon writs of attachment issued in said cause at the suits of defendant Andrew J. Davis vs. Wellington A. Fredericks, and Andrew J. Davis vs. Wellington A. Fredericks and William H. Drew, from the possession of said plaintiff Sarah J. Fredericks two hundred and ninety-five sacks of flour, and that the value thereof was five dollars and fifty cents per sack, and one hundred and seven bushels of wheat of the value of two dollars per bushel, and of said shingles ten dollars in value, and of said lumber of the value of fifty dollars, in all of the value of eighteen hundred and ninety-six dollars and fifty cents.

140 The court further finds that said plaintiff Sarah J. Fredericks is entitled, as against said defendants Charles L. Clark and Andrew J. Davis, to the possession of said property, or the value thereof, to wit, $\$1{,}896\frac{50}{100}$.

Now, on motion of Messrs. E. W. Toole and J. H. Shober, attorneys for said plaintiffs, it is ordered and adjudged by the court that said plaintiff Sarah J. Fredericks do have and recover from said defendants Charles L. Clark and Andrew J. Davis the possession of said property hereinbefore described; and if possession thereof cannot be had, then that said plaintiff do have and recover of said defendants the sum of one thousand eight hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and her costs in this behalf expended, taxed at $\$374\frac{75}{100}$ *dollars* and judgment is hereby rendered in favor of said plaintiff Sarah J. Fredericks, and against said defendants Charles L. Clark and Andrew J. Davis, for the possession of said two hundred and ninety-five sacks of flour, and said one hundred and seven bushels of wheat, and said shingles and lumber, in the pleadings herein described; and if delivery cannot be had, then that said plaintiff Sarah J. Fredericks do have and recover of said defendants the sum of eighteen hundred and ninety-six $\frac{50}{100}$ dollars, the value thereof, and the further sum of $\$374\frac{75}{100}$ *dollars*,

141 her costs and disbursements in this case expended.

(To the rendering of the said judgment these defendants at the time duly excepted.)

(The court sustained objections to further questions of flour that was sold to Hall:

I had 160 sacks of flour as my toll in '75, and may be 20 sacks more. My toll amounted to this from April 1st, 1874, to March, 1875. I never

heretofore testified that from spring, '74, to spring of 1875 I sent 400 sacks of flour to Helena. I sent 50 sacks of flour to Hall during this time, and this was all I did send him during that time.)

That said plaintiffs next offered in evidence the judgment roll and records in the case of Sarah J. Fredericks and Wellington A. Fredericks vs. Andrew J. Davis and Caleb Gilbert, which said judgment roll and records of said cause are in words and figures following:

In the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin.

SARAH J. AND WELLINGTON A. FREDERICKS, plaintiffs,
vs.
ANDREW J. DAVIS AND CALEB GILBERT, defendants.

142 I, the undersigned, clerk of the district court of the first judicial district of said Territory, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in judgment book 3 of said court, at page 381; and I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action.

Witness my hand and the seal of the district court, this 19th day of May, A. D. 1877.

SEAL OF DIST. COURT, 1ST JUD. DIST., GALL. COUNTY, M. T.

THEO. MUFFLY, *Clerk*,
By AMIE J. MALIN,
Dep. Clerk.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
ANDREW J. DAVIS AND CALEB GILBERT AND Wellington A. Fredericks.

This cause came on regularly to be heard on trial, on the question of title and partition of the property mentioned in the complaint herein, this 14th day of May, A. D. 1877, E. W. Toole, esq., and J. H. Shober, esq., appearing as counsel for the plaintiff, and Messrs. Chumasero, Spratt, Woolfolk, Vivion, and Edwards for the defendant Andrew J. Davis; and a jury of twelve men having been regularly empannelled
143 and sworn in said cause, and the jury hearing the evidence, arguments of counsel for the respective parties, and the instructions of the court, retired under a sworn officer to deliberate on their verdict in said cause, and on the 16th day of May, A. D. 1877, the said jury returned their verdict in said cause, which is in the words and figures following, to wit:

Verdict.

In the district court of the first judicial district of Montana Territory, in and for the county of Gallatin.

SARAH J. FREDERICKS & WELLINGTON A. Fredericks, plaintiffs,
vs.
ANDREW J. DAVIS & CALEB GILBERT, defendants.

Issues submitted by the court for special verdict:

1. Who owned the property in controversy in this action at the time this action was commenced?

Answer. A. J. Davis and Sarah J. Fredericks.

2. What interest or share in said property was then owned by the plaintiff Sarah J. Fredericks?

Answer. One-half interest.

3. What interest or share in said property was then owned by the defendant Andrew J. Davis?

Answer. One-half interest.

144 4. What interest or share in said property was then owned by the defendant Caleb Gilbert?

Answer. Such interest as is specified by the mortgage.

5. What interest or share was then owned by Wellington A. Fredericks?

Answer. None.

E. M. DAVIDSON, *Foreman.*

Which said special findings and verdict is hereby approved by the court.

Now, on motion of Messrs. Toole & Shober, attorneys for plaintiff, it is ordered, adjudged, and decreed by the court that Sarah J. Fredericks is the sole owner, as of her own right, of an undivided one-half interest in and to the property mentioned in the complaint herein, and known and described as a certain flouring-mill, situate at the upper end of Lower Willow Creek Valley, on the northeast quarter of the southeast quarter of section seven (7), township one south, of range one, east, with all the tools, implements, water right, mill-dam, and all the appurtenances thereunto belonging, all in the county of Gallatin, Montana Territory; and that Andrew J. Davis is the owner of an undivided one-half interest in and to said property. And it is

145 further ordered, adjudged, and decreed that said Caleb Gilbert has a lien on said undivided interest of the plaintiff in this action, by virtue of a certain mortgage on said undivided interest, for the sum of four thousand dollars, which said lien attached to said property on the 22d day of June, A. D. 1874, which said amount bears legal interest from date. It is further ordered and adjudged by the court that a division of said property is impracticable, and cannot be had without injury to the parties interested. It is therefore ordered, adjudged, and decreed by the court that said property hereinbefore described be sold at public sale, as prescribed by law and the practice of the court, by the sheriff of Gallatin County, Montana Territory, who is hereby appointed referee to make such sale; that said sale be had at the front door of the court-house, at the town of Bozeman, in the county of Gallatin, Montana Territory, on the 22nd day of October, A. D. 1877, at one o'clock p. m., and that said property be sold to the highest bidder for cash in hand; that said sheriff and referee bring the money realized from the sale of said property into this court, and make due report of his proceedings in relation to the sale of said property; that the proceeds of said sale be applied under the direction of the court:

146 1. To the payment of the costs and disbursements incurred in this action.

2. The costs of said sale.

3. That the residue of the one-half interest of said Sarah J. Fredericks be applied in the said mortgage of the said Caleb Gilbert, and that the balance be paid over to the respective parties hereto, in accordance with their respective interests. And it is further ordered, adjudged, and decreed by the court that the said Sarah J. Fredericks have and recover of the said Andrew J. Davis her costs and disburse-

ments necessarily incurred in defending and establishing her right to the undivided interest in said property, contested in this cause by said Andrew J. Davis, taxed at one hundred and sixty and $\frac{80}{100}$ dollars.

Given under my hand, this 17th day of May, A. D. 1877.

HENRY N. BLAKE, *Judge.*

To the introduction of the same the said defendants objected, upon the ground of irrelevancy, and for the additional reasons that the said cause and the judgment rendered therein had been appealed to the supreme court of this Territory, the said cause as appealed not having been determined by said supreme court.

147 Incorporate all amendments filed Nov. 26, 1877, and allowed by me Dec. 7, 1877.

HENRY N. BLAKE, *Judge.*

And afterwards, to wit, on the 15th day of November, A. D. 1877, the said defendants filed in the office of the clerk of the said district court their bill of exceptions in this cause, which said bill of exceptions was then, by direction of the judge of said district court, filed as of the 26th day of November, A. D. 1877; which bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

SARAH J. FREDERICKS, PLAINTIFF,
vs.
CHARLES L. CLARK, SHERIFF, &C., DEFENDANTS. } 132.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants. } 166.

Be it remembered that the said Sarah J. Fredericks having filed her amended complaint in this court against the above-named defendant Charles L. Clark, sheriff, &c., which said amended complaint is

148 in the words and figures following, to wit:

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS, WITH WHOM IS ASSOCIATED Wellington A. Fredericks, her husband, as plaintiffs.
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

The plaintiff Sarah J. Fredericks, for amended complaint herein, by leave of the court first had and obtained, states:

1. That on the 8th day of March, A. D. 1875, she was, and for a long time previous thereto she had been, and now is, a married woman, and the wife of Wellington A. Fredericks, her coplaintiff above named. That on the 8th day of March, A. D. 1875, at the county of Gallatin and Territory of Montana, this plaintiff Sarah J. Fredericks was the

sole and exclusive owner and possessor in her own right, as sole trader, of the following goods and chattels, to wit: Two hundred and eighty-two sacks XXX (trible X) flour of the "Willow Creek Flouring Mill" make and brand, and one hundred and seven bushels of wheat, and five hundred feet of pine lumber; that said flour and wheat was
149 of the value of two thousand two hundred dollars, and said lumber was of the value of thirteen ($13.00) dollars.

3. That the defendants, on the 8th day of March, A. D. 1875, while this plaintiff was the sole and exclusive owner of said property at the said county of Gallatin and Territory of Montana, without this plaintiff's consent, did wrongfully and unlawfully take said goods and chattels from the possession of this plaintiff Sarah J. Fredericks.

4. That before the commencement of this suit, to wit, on the 31st day of March, A. D. 1875, this plaintiff demanded possession of said goods and chattels of said defendants, but said defendants refused to deliver possession of the same or any part thereof, notwithstanding this plaintiff was then and now is entitled to the possession of the same.

5. That said defendants do now wrongfully and unlawfully withhold and detain possession of said property, goods, and chattels from the possession of this plaintiff, to her damage in the sum of two hundred dollars.

Wherefore this plaintiff Sarah J. Fredericks demands judgment against said defendants: 1st. First, for the recovery of the possession of said property, goods, and chattels, or for the sum of two thousand two hundred and thirteen dollars ($2,213.00), the value thereof, in case delivery cannot be had.

150 2. Second, for two hundred dollars damages and for costs of suit.

JOHNSTON & TOOLE, AND
J. H. SHOBER.
Plaintiffs' Attorneys.

MONTANA TERRITORY,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says she is one of the plaintiffs in the above-entitled action, and that she has heard read the foregoing amended complaint, and knows the contents thereof, and that the same is true of her own knowledge.

SARAH J. FREDERICKS.

Subscribed and sworn to before me, this 3rd day of May, A. D. 1876.
JAMES G. DOW,
Notary Public.

And afterwards, to wit, on the 26th day of May, A. D. 1876 the said, defendants filed herein his amended answer, of which said answer, in words and figures, the following is a copy, to wit:

Amended answer.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Now come the above-named defendants, by their attorneys, and

151 for answer to the amended complaint of the plaintiffs filed herein deny each and every allegation in the said complaint contained.

Defendants deny that on the 8th day of March, A. D. 1875, or at any other time, at the county of Gallatin and Territory of Montana, or elsewhere, the said plaintiff Sarah J. Fredericks was the sole or exclusive owner or possessor in her own right, as sole trader or otherwise, of the goods or chattels set out and attempted to be described in plaintiffs' said complaint. Deny that the defendants or either of them ever at any time wrongfully or unlawfully took said or any goods or chattels from the possession of said plaintiff Sarah J. Fredericks.

Deny that before the commencement of this suit the said plaintiff demanded of defendants the possession of said goods or chattels, or any thereof.

Deny that said plaintiff was or is entitled to the possession of said goods or chattels, or any thereof.

Deny that defendants do now wrongfully or unlawfully withhold or detain possession of said property, goods, or chattels from the possession of the said plaintiff, in her damage in the sum of two hundred dollars or in any other sum.

The defendants, for further answer, aver that on or about the 152 8th day of March, A. D. 1875, the said defendant Charles L. Clark was sheriff of Gallatin County, in said Territory, and that on or about the date last aforesaid, as such sheriff, the said defendant Clark, under and by virtue of two several writs of attachment issued out of the office of the clerk of the district court in said county of Gallatin, one in a case then pending in said court wherein Andrew J. Davis was plaintiff and W. A. Fredericks and W. H. Drew were defendants, and one in a case therein pending wherein the said Andrew J. Davis was plaintiff and Wellington A. Fredericks was defendant, said writs being dated the 6th day of March, 1875, did seize and levy upon, as the property of Wellington A. Fredericks, the defendant in said writs of attachment and one of the plaintiffs herein, certain goods and chattels, consisting of flour and lumber, a portion of which is attempted to be described in plaintiffs' said amended complaint, but a particular description of said property seized by said defendant, as sheriff as aforesaid, is attached to and endorsed on the writs of attachment aforesaid, reference being had thereto.

Defendants further aver that the goods and chattels so levied upon as aforesaid, at the time aforesaid, under and by virtue of the writs aforesaid, were at the time of said levy the property of the said 153 Wellington A. Fredericks, one of the plaintiffs to this action, and that if the said plaintiff Sarah J. Fredericks ever at any time had possession of any of said goods and chattels, or of the goods and chattels set forth in plaintiffs' said amended complaint, the defendants aver that such possession was a fraudulent one, and that the same were held by her for said Fredericks under cover, to conceal the same from the creditors of the said Wellington A. Fredericks, and to defraud the said defendant Andrew J. Davis and other creditors of said Fredericks, and prevent the collection of just debts of said Davis and others against W. A. Fredericks. Defendants deny that the said plaintiff Sarah J. Fredericks has sustained any damage whatever by reason of the acts of these defendants. And having fully answered, the defendants ask to be dismissed, with their costs herein expended.

T. R. EDWARDS & SAM'L. WORD,
Att'ys for Plaintiffs.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Andrew J. Davis, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the
154 facts therein stated are true of his own knowledge.

(Signed) ANDREW J. DAVIS.

Subscribed and sworn to before me, this May 26th, A. D. 1876.

{ SEAL OF 3D JUD. DIST. COURT OF M. T. } ALEX. H. BEATTIE,
Clerk of the 3rd Jud. District Court, M. T.,
By JNO. N. HELDT,
Deputy Clerk.

And afterwards, to wit, on the 27th day of May, A. D. 1876, the said plaintiff filed herein her replication to the said answer of defendant, which said replication is in the words and figures following, to wit:

Replication.

In first judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

Now comes the plaintiff, and for replication to defendants' answer herein:

1st. Denies that at the time of the levy of the attachment herein, or at any other time, Wellington A. Fredericks was the owner of or had any interest in any of the property mentioned in plaintiffs' complaint herein. Deny that any of said property in plaintiffs' complaint
155 mentioned was ever held by Sarah J. Fredericks for the purpose of covering up the same from defendant A. J. Davis, or any creditor of Wellington A. Fredericks.

3. Deny that said property was ever held by said Sarah J. Fredericks in fraud of any creditor of said Wellington A. Fredericks, or to hinder or delay any creditors of said Wellington A. Fredericks.

Wherefore plaintiff demands judgment, as in her complaint herein prayed for.

JOHNSTON & TOOLE,
J. H. SHOBER, AND
SANDERS & CULLEN.
Attorneys for Plaintiff.

MONTANA TERRITORY,
Gallatin County:

Sarah J. Fredericks, being duly sworn, says she is plaintiff in the above-entitled action, and that she has heard read the foregoing replication and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

SARAH J. FREDERICKS.

Subscribed and sworn to before me, this 27th day of October, A. D. 1876.

J. H. SHOBER,
Notary Public, M. T.

156 And the said Sarah J. Fredericks and Wellington A. Fredericks having commenced this suit in this court against Charles L. Clark and Andrew J. Davis, filed herein their complaint, of which, in words and figures, the following is a copy, to wit: (Here insert same.) Which see at pages 10 to 12.

That thereafter the said defendants filed their answer to said complaint, which said answer is in the words and figures following, to wit: Which see at pages 13 to 18.

That thereafter the said plaintiffs filed their replication to said answer, which said replication is in the words and figures *figures* following, to wit: (Here insert replication.) Which see at pages 19 to 23.

That afterwards, to wit, on the 11th day of May, A. D. 1877, and at the May term, 1877, of this district court, an order was duly made herein consolidating the two foregoing actions. (Here insert order.) Which see at pages 24 to .

Said causes thereafter were proceeded with in said court un-
157 der the title of the causes of "Sarah J. Fredericks and Wellington A. Fredericks, as plaintiffs, and Charles L. Clark and Andrew J. Davis, defendants."

On appeal, the defendants submit the following statement:

SARAH J. FREDERICKS ET AL., PLAINTIFFS,
vs.
CHARLES L. CLARK, SHERIFF, DEF'T,

and

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, def'ts.

Plaintiffs' testimony.

SARAH J. FREDERICKS, one of the plaintiffs, testified as follows, to wit: Which see pages 25 to 29; cross-examination, pages 29 to 31, with exception.

Defendant CHARLES L. CLARK was here introduced as a witness, was duly sworn, and testified, on oath, as follows: Which see at pages 31 to 33.

Defendant ANDREW J. DAVIS was then introduced as a wit-
158 ness on part of defendants, was duly sworn and examined on oath, and testified as follows, to wit: Which see testimony at pages 34 to 38.

Defendant Charles L. Clark was recalled on part of defendants, and examined as a witness, and testified as follows, to wit: Which see testimony at pages 38 to 39; cross-examination at page 39.

W. V. RYAN was then introduced as a witness, was sworn and examined, and testified on oath as follows, to wit: Which see testimony at pages 39 to 40; cross-examination at page 39.

MARSHALL COURSIEN was introduced as a witness, duly sworn and examined, and testified on oath as follows, to wit: Which see testimony at page 40; cross-examination at page 40.

C. W. HASKINS was then introduced as a witness, duly sworn and examined, and testified on oath as follows, to wit: Which see testimony at page 40.

Rebuttal testimony by plaintiffs.

ELLISON was introduced, sworn and examined, and testified as follows, to wit: Which see testimony at pages 40 to 42.

JOHN W. GRANNIS was then introduced as a witness, duly
159 sworn as sueh, and, on examination, testified as follows, to wit: Which see testimony at pages 42 to 43.

MIKE LANE was then introduced as a witness, and testified as follows, to wit: Which see testimony at page 43.

W. V. RYAN was then examined. Which see testimony at page 43.

WATTS. Which see testimony at pages 43 to 44.

Mrs. FREDERICKS. Which see testimony at pages 44 to .

The deed from W. H. Drew to Mrs. Fredericks is here admitted in evidence. Which see at pages 46 to 48.

The pleadings in the title case were here introduced. Which see at pages from 49 (and objected to. Objection overruled, and ruling excepted to).

(Here insert copies of all letters introduced by plaintiff from Davis; also all documentary introduced by plaintiff. Which see affidavit, sole traders, &c., at page 72; receipt of Arick, 76; receipt of Lyman, 76; account of R. E. Arick, 76; account of A. J. Davis at pages 77 to
160 83; receipts of A. J. Davis to W. H. Drew & W. A. Fredericks, 83; lease of A. J. Davis to W. A. Fredericks, 84; deed from A. J. Davis to W. H. Drew and Sarah J. Fredericks, 84 & 85; account of Messrs. Toole & Toole, 85 & 86; letters of plaintiff from A. J. Davis, 86 to 90; agreement of Davis and Drew to build the mill, at pages 91 to 93.

Defendants next introduced in evidence the complaint, affidavit, and writ of attachment based thereon, and the sheriff's return thereon, in the two cases of Andrew J. Davis vs. Wellington A. Fredericks, and Andrew J. Davis vs. Wellington A. Fredericks and William H. Drew, which are in words and figures following: (Here insert the same.)

Which see complaint at pages 93 to 95; summons, 95 to 97; affidavit, 97 to 98; writ of attachment, 98 to 99; sheriff's return, 99 to 100; complaint, 101; summons, 103 to 105; affidavit, 105 to 106; writ of attachment, 106 to 107; sheriff's return, 107 to 109.

161 Defendants next introduced in evidence letters from Wellington A. Fredericks to the defendant Davis—the handwriting and signatures are admitted to be genuine—which are numbered from one (1) to eighteen (18), inclusive, all numbered in red ink, which said letters, from one to eighteen, inclusive, are in words and figures following, to wit: (Here insert said letters.) Which see said letters at pages 109 to page 132.

This court, sitting as a jury in said cause, proceeded after the close of the testimony to find the facts, which finding is in words and figures following, to wit: (Here insert findings.) Which see said findings at pages 132 to page 134.

And the law thereon to the findings of said facts the defendants at the time excepted, because the same is contrary to the evidence and against the weight thereof, and that the conclusions of law found therefrom are erroneous, not supported by the proof in said cause or authorized by the facts so found by the court.

162 That at the same time these defendants submitted findings of fact to said court and requested him to find in accordance therewith which said findings are in words following: (Here insert the same.) Which see at pages 135 to 138.

Which said findings were refused and rejected by said court. To the ruling of the court in refusing to find in accordance therewith thes' defendants at the time excepted.

That thereafter the said court, on the 1st day of November, 1877, proceeded to render judgment against these said defendants, which said judgment is in words and figures following, to wit: (Here insert the same.) Which see said judgment at pages 139 to page 141.

To the rendering of the said judgment these defendants at the time duly excepted.

The said plaintiffs next offered in evidence the judgment roll and records in the case of Sarah J. Fredericks and Wellington A. Fredericks vs. Andrew J. Davis and Caleb Gilbert, which said judgment roll and records of said cause are in words and figures following, to wit: (Here insert same.) Which see said judgment rolls and records above mentioned at pages 141 to page 146.

163 To the introduction of the same the said defendants objected upon the grounds of irrelevancy, and for the additional reason that the said cause and the judgment rendered therein had been appealed to the supreme court of this Territory, the said cause on appeal not having been determined by said supreme court.

Incorporate all amendments filed November 26th, 1877, and allowed by me Dec. 7, 1877.

HENRY N. BLAKE, *Judge.*

And afterwards, to wit, on the 1st day of November, A. D. 1877, the said defendants filed in the office of the clerk of the said district court their notice of appeal in said cause, which said notice of appeal is in the words and figures following to wit:

Notice of appeal.

In the district court of the 1st judicial district in and for Gallatin County, Montana Territory.

SARAH J. FREDERICKS
vs.
CHARLES L. CLARK, SHERIFF. } 132.

AND

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks
vs.
164 CHARLES L. CLARK AND ANDREW J. Davis. } 166. Notice of appeal.

To the above-named plaintiffs and Messrs. Johnston & Toole and J. H. Shober, their attorneys:

You will please take notice that said defendants in the above-entitled action hereby appeal from the judgment, and every part thereof, rendered in said court on the 1st day of November, 1877, in favor of the plaintiffs and against said defendants, to the supreme court of Montana.

SAM'L WORD,
JAMES G. SPRATT, &
T. R. EDWARDS,
Att'ys for Defendants.

Received copy of the within notice this 1st day of November, 1877.
E. W. TOOLE & J. H. SHOBER,
Att'ys for Plaintiff.

And afterwards, to wit, on the 2nd day of November, A. D. 1877, the said defendants filed in the office of the clerk of the said district court their undertaking on appeal and to stay the execution of the said judgment, which undertaking was on the day and year last aforesaid duly approved by the clerk of the said district court, which said undertaking is in the w'rds and figures following, to wit:

165 *Undertaking on appeal.*

In the district court of the 1st judicial district, in and for Gallatin County, Montana Territory.

SARAH J. FREDERICKS
vs.
CHARLES L. CLARK, SHERIFF, } 132.

AND

SARAH J. FREDERICKS AND WELLINGTON A Fredericks
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS. } 166. } Consolidated.

Whereas the defendants in the above-entitled consolidated actions have given notice to said plaintiffs of their appeal to the supreme court of Montana Territory from a judgment made and entered against said defendants in said consolidated acotins in the said district court in favor of the said plaintiffs in said action, on the 1st day of November, A. D. 1877, for one thousand eight hundred and ninety-six & $\frac{50}{100}$ dollars damages, and four

hundred and thirty-eight dollars costs of suit: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, resident householders of Gallatin County and Montana Territory,
166 do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake, promise, and do acknowledge ourselves further jointly and severally bound in the further sum of four thousand and six hundred and sixty-nine dollars, being double the amount named in the said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, the appellant shall pay plaintiffs the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. Interlineations made before signing.

Witness our hands and seals, this 2nd day of November, A. D. 1877.

A. LAMME. [SEAL.]
LESTER S. WILLSON. [SEAL.]

167 TERRITORY OF MONTANA,
Gallatin County, ss:

We, A. Lamme and Lester S. Willson, being duly sworn, each for himself, says that he is a resident householder and a merchant by occupation in said county and Territory, and that he is worth the sum of five thousand dollars over and above all just debts and liabilities and property by law exempt from execution.

A. LAMME.
LESTER S. WILLSON.

Subscribed and sworn to before me, this 2nd day of November, A. D. 1877.

THEO. MUFFLY, *Clerk.*

That afterwards, to wit, on the 15th day of December, A. D. 1877, the said defendants filed in the office of the clerk of said district court their præcipe for transcript on appeal herein, which said præcipe is in words and figures following, to wit:

Præcipe for transcript.

In the district court of the 1st judicial district in & for Gallatin County and Montana Territory.

SARAH J. FREDERICKS, PLAINTIFF, *vs.* CHARLES L. CLARKE, SHERIFF, DEFENDANT, } 132.
168 AND
SARAH J. FREDERICKS AND WELLINGTO' A. FREDERICKS *vs.* CHARLES L. CLARK AND ANDREW J. DAVIS. } 166.
} Consolidated.

To the clerk of the said district court:

You will please make out a transcript of the above-entitled cause for

the supreme court, and insert therein the bill of exceptions and statements on file in said cause, and all papers, orders, judgments, and records inserted or included in said bill of exceptions or statement, or referred to therein, notice of appeal, and undertaking on appeal.

T. R. EDWARDS,
Att'y for Defendant.

TERRITORY OF MONTANA,
County of Gallatin, ss:

I, Theo. Muffly, clerk of the district court of the first judicial district of Montana Territory, in and for the county of Gallatin, do hereby certify that the foregoing 146 pages, numbered from 1 to 146, inclusive, contain a full, true, and correct transcript of certain of the pleadings, records, and proceedings filed, made, and had in said court in the cause of Sarah J. Fredericks, plaintiff, against Charles
169 L. Clark, sheriff, &c., defendant, and Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, against Charles L. Clark and Andrew J. Davis, defendants, consolidated cases.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Bozeman City, this 8th day of January, A. D. 1878.

{ SEAL DIST. C'T 1 JUD. DIST., GALLAINT CO., M. T. }

THEO. MUFFLY, *Clerk.*
By AMIE J. MALIN,
Deputy Clerk.

170 In the supreme court, Montana Territory, January term, A. D. 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants & appellants. } 270.

Be it remembered that in the present term of January, in the year of our Lord one thousand eight hundred and seventy-eight, the above-entitled action was brought into this supreme court from the district court of the first judicial district of said Territory, in and for Gallatin County, by virtue of an appeal from the judgment rendered and entered therein by said district court in favor of said plaintiffs and respondents and against said defendants and appellants, agreeably to the statute of said Territory, and the rules of said supreme court in such case made and provided.

And thereafter, to wit, on the 21st day of January, A. D. 1878, the said appellants filed herein a supplemental transcript of record containing certain findings of fact of the court below in said cause, of which said transcript of record the following is a copy, to wit:

171 *Supplemental record.*

In 1st judicial district court, Gallatin County, Montana Territory.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants.

This cause coming on to be heard before the court this 31st day of

November, A. D. 1877, a jury having been expressly waived by the parties plaintiffs and defendants in open court, and after hearing the evidence in said cause and arguments of counsel for the respective parties plaintiffs and defendants the court finds the following as findings of fact in said cause:

1st. That the plaintiff Sarah J. Fredericks, at the time the said property is alleged to have been taken which is described in the complaint in the two actions consolidated herein, was owner of the following portion thereof as sole trader, and in the possession of the same, to wit: 295 sacks of flour, worth $5.50 per sack; 107 bushels of wheat, and that the same was worth two dollars per bushel; shingles of the value of $10.00; lumber of the value of $50.00. That all of said property
172 was of the value of one thousand eight hundred and ninety-six dollars and fifty cents.

2. That the said property was taken by the defendant C. L. Clark, as sheriff of Gallatin County, by virtue of two writs of attachment procured by defendant A. J. Davis, at the suit of Andrew J. Davis vs. Wellington A. Fredericks and William H. Drew, and Andrew J. Davis vs. Wellington A. Fredericks.

3. That said property was converted by said defendants, and the money realized therefor detained by them.

4. That plaintiff claimed to be the owner of said property in March, A. D. 1875, when the same was taken by defendants, and demanded possession thereof from said defendants in March, A. D. 1875, after the same had been taken by them.

5. The court finds no damages for plaintiff for the detention of said property, and allows the plaintiff no interest on the value of said property from the date of the conversion thereof, which was the 15th day of April, A. D. 1875.

6. That plaintiffs, since January 1, A. D. 1869, have been husband and wife.

The court orders judgment in favor of said plaintiff Sarah J. Fredericks, and against said Charles L. Clark and Andrew J. Davis, for a return of said property, and if return thereof cannot be had, then for the sum of one thousand eight hundred and ninety-six dollars
173 and fifty cents, and for costs of suit.

HENRY N. BLAKE, *Judge.*

TERRITORY OF MONTANA,
County of Gallatin, ss:

I, Theo. Muffly, clerk of the first judicial district court of Montana Territory, in and for the county of Gallatin, do hereby certify that the foregoing on pages from 1 to 3, inclusive, contain a full, true, and correct copy of the court's findings of fact in the case of Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, against Charles L. Clark and Andrew J. Davis, defendants, and that said findings of fact were omitted in the original transcript to the supreme court of Montana Territory in said cause, which said original transcript is now on file in the office of the clerk of said supreme court.

In witness of which I hereunto set my hand and affix the seal of said court, this 11th day of January, A. D. 1878.

SEAL OF THE DIST. COURT 1ST JUD. DIST., GALLATIN COUNTY, M. T.

THEO MUFFLY, *Clerk,*
By AMIE J. MALIN,
Deputy Clerk.

And on the same day the said appellants filed herein their brief of

points and authorities, of which, in words and figures, the following is a copy, to wit:

174 *Argument of appellant.*

In the supreme court of the Territory of Montana, January term, A. D. 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants and appellants.

This is an action to recover certain personal property alleged to have been wrongfully taken and withheld by defendants. The answer, denying the averments of the complaint, set up also a fraud on the part of plaintiffs in *in* their claim upon the property; admits the taking of the property by virtue of certain writs, as the property of one of the plaintiffs; avers that the same was fraudulently held and claimed by Sarah J. Fredericks, that her sole tradership, by virtue of which she claimed to hold the property, was a fraud, a trick, and device to cover up the property of plaintiff W. A. Fredericks, and to deceive, defraud, and delay the creditors of W. A. Fredericks, whose property the said answer avers the property in suit to have been at the time of seizure.

(See answer, pp. 11 to 16, inclusive.)

Among the issues presented by the pleadings is one of a fraud on part of plaintiff Sarah J. Fredericks.

175 The court below erred in not finding upon the issue of fraud tendered by the answer and replication. In this the findings are totally defective.

(See Farrar vs. Lyon, 19 Mo., 122; 7 California, 137; 10 California, 411.)

The court fails to find the amount of lumber and shingles taken by defendants; the court only finds the value of an indefinite amount. This is error, and plaintiffs to that extent were not entitled to a judgment.

(See 30th of California, page 419.)

Facts are averred by defendants in their answer materially affecting the rights of the parties, which have been entirely overlooked by the court in its findings, although findings thereon were requested by defendants. This is error, and ground of reversal.

(See Downing vs. Bowlier, 21 Mo., 149.)

The facts put in issue should be found, not the evidence or conclusions of law, and the findings must cover all the issues.

(See Cod. Statutes; Bates vs. Bower, 17 Mo., 550; Walsh vs. Edmonson, 19 Mo., 142; Farrar Lyon, 19 Mo., 122; Javen vs. Harris, 20 Mo., 262; 24 Missouri, 343.)

176 There is no evidence to support the findings of the court as made, and the court should have found on the issues presented, as requested by defendants.

(See transcript, pages 123 to 125.)

There appear two sets of findings in this case, none of which are supported or justified by the evidence.

(Transcript, pages 120 to 122. See supplemental transcript appended.)

The court erred in admitting in evidence the pleadings, record, and judgment-roll in the case of Sarah J. Fredericks and W. A. Fredericks vs. A. J. Davis and Caleb Gilbert, because the said cause was then pending in the courts of the Territory, and no final judgment had been rendered therein.

(See 33 California, page 474.)

The court below, in this case, seems to have deviated from that rule usually observed in courts of law in this country, which allows one party to cross-examine a witness called by the opposite party.

(See transcript, pages 24, 25, 26, and 27.)

The right to cross-examine a witness does not rest in the discretion of the court, but it is a legal right of which a party should not be deprived. In this particular it is respectfully suggested that the court has committed error. Some interesting suggestions as to the right of cross-examination, emanating from respectable legal authority, may be found in 14 Cal., 18. The case was not tried to a jury, and it
177 was the plaintiff herself that the court refused to allow defendants to ask certain questions, many of which were eminently proper and material, and correct cross-examination. Answers to the questions put may have shown that the plaintiffs had really no right or claim upon the property in question.

SAMUEL WORD,
Of Counsel for Defendants.

And afterwards, to wit, on the 23d day of January, A. D. 1878, the said plaintiffs and respondents filed herein their brief of points and authorities, of which, in words and figures, the following is a copy, to wit:

Respondents' brief.

In the supreme court of the Territory of Montana, January term, A. D. 1878.

SARAH J. FREDERICKS ET AL., PLAINTIFFS & respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants and appellants.

The issue of fraud was fully presented and determined by the court in finding that plaintiff, as sole trader, was the owner of, in possession, and entitled to the possession of the property in controversy at the time of the seizure by the sheriff.

178 2. Besides, the court was not requested to find upon the question of fraud. It is true that defendants did ask the court to find affirmatively that there was fraud, but this is not sufficient. It is enough to know that if there was fraud and the property belonged to Fredericks, and was covered up by the plaintiff, it simply affected the question of title, which fact is found in favor of plaintiff. It will be seen that the only finding on the subject offered was that the holding of the property by plaintiff was a trick and device, &c. This the court could not find, and this is what it was requested to do. Had defendant requested the court to find whether or not it was a trick and device, and such finding was not covered in the determination of the right of property, there might be something in appellants' points.

3. It will be seen that the defendants did not request the court to find the value of the lumber and shingles in accordance with section 220, Pr. Act, but the court, on its own motion, did so find. (See record, page 121.)

4. The question of ownership of the mill had nothing to do with the right to the flour. It could make no difference whether the mill was the property of plaintiff or Davis. But it will be seen from the
179 record that defendant went into this question, and the evidence offered by plaintiff was in rebuttal of this immaterial fact. The judgment, however, in which the title to the mill was determined was competent under the rules of evidence. (See Freeman on Judgments, page 291, sec. 328. See Sage vs. Harpending, 49 Barbour, page 166; Harris vs. Hammond, 18 Howard, page 123; Burton vs. Burton, 28 Indiana, 342; Hill vs. Campant, 16 Indiana, 107; Bank vs. Wheeler, 28 Connecticut, 433; Curtis vs. Beardsly, 15 Conn., 518.)

5. Besides, there was no conflict in the evidence. It all showed that Davis, the real party in interest, conveyed the mill to plaintiff, which was exchanged for the one referred to, and advised her to get out her sole-trader papers. (See 52 Barbour, 26; 4 Cowan, 406; 3 John., ch. 354; 5th Wendell, 661.)

6. No objection to this evidence was made on account of the judgment being between different parties. If such objection could be entertained Davis was the real party in interest, and Clark was only an agent. (See Lomme vs. Sweeny, 1 Blake, 598; 22 Wall., 208.)

7. So far as the evidence is concerned it fully supports the case of plaintiffs.

180 8. It will be seen that plaintiff was in possession at the time of the seizure. This was all that was necessary for her to show, as she was not the judgment debtor. (See 3 Barb., 110, Merritt vs. Lyon.)

9. This being the case, the cross-examination sought by defendant was improper. Besides, the order of proof is a matter of discretion with the court, and defendants had the full benefit of an examination of the witness in rebuttal. (See record.)

J. H. SHOBER AND E. W. TOOLE,
Att'ys for Resp'd'ts.

And afterwards, to wit, on the 24th day of January, A. D. 1878, the said cause came on to be heard before the court upon the transcript of record filed herein, and was argued by counsel and submitted. Thereupon the court took said cause under advisement until the next term of this court.

In the supreme court of the Territory of Montana, August term, A. D. 1878.

SARAH J. FREDERICKS ET AL.
vs.
CHARLES L. CLARK ET AL.

181 This cause having been argued and submitted at the January term, A. D. 1878, of this supreme court, and the same having been taken under advisement by the court until this present term, comes regularly on, on this 14th day of August, A. D. 1878, for determination on appeal. Whereupon the court delivers its opinion in writing, which is filed and entered of record, said opinion being in words and figures following, to wit:

In the supreme court of the Territory of Montana, January term, 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW. J. DAVIS, defendants and appellants.

Appeal from Gallatin County, first district.

Opinion of the court delivered by Wade, chief justice.

The ownership of certain flour and lumber attached by the defendant Davis as the property of W. A. Fredericks, one of the plaintiffs, and replevied by Sarah J. Fredericks, wife of the said W. A. Fredericks, as her own separate property, is involved herein; the defense resting chiefly upon the allegation that W. A. Fredericks was the owner
182 of the undivided one-half of a certain flouring-mill; that for the purpose of hindering, delaying, and defrauding his creditors he caused the same to be conveyed to his wife, Sarah J. Fredericks; that the flour and lumber in question were the profits and proceeds of such mill after such conveyance, and therefore the property of the husband; and this claim of fraud in such conveyance having been set at rest in the case of Fredericks vs. Davis and Gilbert, decided at this term (3 Mon., page), wherein it was finally determined and adjudged that Sarah J. Fredericks, by virtue of the conveyance aforesaid, became the bona fide owner of the undivided one-half of said mill, and as such owner entitled to partition thereof, there is not much left to try in this action.

The case was tried to the court without a jury, and one of the errors complained of by the defendant is that the findings of fact do no cover the issue of fraud raised in the pleadings. Undoubtedly the findings should be as broad as the issues. The defendant having charged that the plaintiff Sarah J. Fredericks held and claimed the property mentioned in the complaint in order to cover it up, and for the purpose of cheating and defrauding the creditors of her husband, and the court having found that said Sarah J. Fredericks was the owner of the property as sole trader, and that the same was wrongfully seized by
183 the defendant Clark, sheriff, as the property by her husband, at the suit of Davis, we do not see but the finding is as broad as the issue, and conclusively covers the question of fraud raised in the pleadings.

2. The case of Fredericks vs. Davis and Gilbert, wherein title to the mill property had been adjudicated, was determined in the district court, and an appeal to the supreme court pending therein, when the pleadings, record, and judgment roll in that case were admitted in evidence in this one to rebut the attack of the defendant on the title of plaintiff, and such admission is assigned as error. If this had been error it is not such an one as ought to reverse the case, for since the affirmation in the supreme court of the judgment so introduced, whereby upon a second trial such judgment would become competent evidence, a reversal of the case would work no advantage to the defendant. But we do not think that an appeal may be considered as suspending the operation of a judgment so that it is not admissible as evidence in any controversy between the parties. Until reversed or annulled the judgment is binding upon the parties, as to every question decided, directly, and an appeal, with a proper bond, to stay proceedings only suspends
184 the right to execution. "If the appeal is in the nature of a writ of

error, conferring power on the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court upon such determination no other authority than that of reversing, modifying, or affirming the judgment of the inferior court, and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgments and proceedings to the views of its superior, then the judgment appealed from does not, until vacated or reversed, cease to operate as a merger and bar." (Freeman on Judgments, sect. 328, and cases cited.)

There was no objection to the judgment because it was not between the same parties, nor could such objection have been made, for it was between the same parties in interest, and determined the title to the mill property as between W. A. and Sarah J. Fredericks, the very question that Davis sought by his attack upon the title of Sarah J. to have tried again in this action.

3. The defendant, as often happens, sought to make out his defense on the cross-examination of plaintiffs' witness. The refusal to permit this where the examination-in-chief had not opened the door was
185 not error. Even if the defendant had been entitled to the proposed cross-examination of Sarah J. Fredericks he was not in any manner injured, for when she came again to the witness stand in rebuttal the examination took place, and, juding from her testimony, covered all the questions proposed upon her former examination.

The judgment is affirmed, with costs.

DECIUS S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
HENRY N. BLAKE,
Asso. Justice.

Thereupon judgment on appeal was entered in this cause in the following words, to wit:

Judgment on appeal.

In supreme court, Aug. term, 1878.

SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, plaintiffs and respondents,
vs.
CHARLES L. CLARK AND ANDREW J. DAVIS, defendants and appellants.
} 270.

Whereas in the present term of August, in the year of our Lord one thousand eight hundred and seventy-eight, this cause came on in said supreme court for determination on appeal; whereupon it is now
186 here ordered and adjudged by this court that the findings and judgment of the district court of the first judicial district of this Territory, in and for the county of Gallatin, entered in this cause on the 30th day of October, A. D. 1877, be, and the same is hereby, affirmed, with costs. And it is further ordered by this court that the said plaintiffs, Sarah J. Fredericks and Wellington A. Fredericks, respondents herein, recover against the said defendants and appellants, Charles L. Clark and Andrew J. Davis, dollars, for their costs herein expended, and have execution therefor.

Judgment on appeal entered Aug. 14, 1878.

And thereafter, to wit, on the 19th day of August, A. D. 1878, this cause came on to be heard before the court on the application of appellant Davis for a writ of error herein to remove said cause to the Supreme Court of the United States; whereupon it is ordered that such writ of error be allowed, and that the penalty of the bond on appeal to accompany such writ be, and the same is hereby, fixed at the sum of five thousand dollars.

187 And on the 23rd day of August, A. D. 1878, the said appellant, Andrew J. Davis, filed in the clerk's office of the supreme court of Montana Territory his writ of error to remove this cause to the Supreme Court of the United States, which said writ of error is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Montana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court before you between Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, and Andrew J. Davis and Charles L. Clark, defendants, a manifest error hath happened to the great damage of the said Andrew J. Davis and Charles L. Clark, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,

188 together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-eight.

{ SEAL OF SUP. C'T, M. T. }

I. R. ALDEN,
Clerk of the Supreme Court Montana Territory.

Allowed by—

DECIUS S. WADE,
Chief Justice of Supreme Court Montana Territory.

And on the same day, to wit, the 23rd day of August, A. D. 1878, the said appellant filed herein his citation, of which, with the affidavit of service thereof endorsed thereon, the following is a copy, to wit:

Citation.

SARAH J. FREDERICKS AND WILLINGTON A. Fredericks,
vs.
ANDREW J. DAVIS AND CHARLES L. CLARK.

189 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Andrew J. Davis and Charles L. Clark are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable D. S. Wade, chief justice of the supreme court of the Territory of Montana, this 23rd day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

{ SEAL OF SUPREME C'T, M. T. } DECIUS S. WADE, *Chief Justice.*

Endorsement of service.

I hereby certify and return that on the 26th day of August, 1878, in my district, to wit, at Helena, in the county of Lewis and Clarke, and Territory of Montana, I personally served the within citation on
190 E. W. Toole, esq., one of the attorneys of the defendants in error herein, by showing the same to him, with the seal of the court attached, and at the same time delivering to and leaving with him a true copy thereof.

Dated Helena, M. T., Aug. 26, 1878.

ALEX. C. BOTKIN,
U. S. Marshal, Dist. of Montana.

Fees: Service, $2.00; copy, 20—$2.20.

And on the same day, to wit, the 23rd day of August, A. D. 1878, the said appellant Andrew J. Davis filed herein his bond, with sureties as required by law, to accompany the writ of error in this cause, in the sum of five thousand dollars, the penalty fixed by the order of court made and entered August 19, 1878, of which said bond, in words and figures, the following is a copy, to wit:

Know all men by these presents that we, Andrew J. Davis, as principal, and Samuel T. Hauser, and Anton M. Holter, as sureties, are held and firmly bound unto Sarah J. Fredericks and Wellington A. Fredericks in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Sarah J. Fredericks and
191 Wellington A. Fredericks, their executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals and dated the twenty-first day of August, A. D. one thousand eight hundred and seventy-eight.

Whereas lately in a suit, at the August term of the supreme court of the Territory of Montana, depending in said court between Sarah J. Fredericks and Wellington A. Fredericks, plaintiffs, and Andrew J. Davis and Charles L. Clark, judgment was rendered against the said Andrew J. Davis and Charles L. Clark, and the said Andrew J. Davis and Charles L. Clark has sued out a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sarah J. Fredericks citing and admonishing her to be and appear at a Supreme Court of the United States to be holded at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said Andrew J. Davis and Charles L. Clark shall prosecute their said writ of error with effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be
192 void, else to remain in full force and virtue.

A. J. DAVIS. [SEAL.]
S. T. HAUSER. [SEAL.]
A. M. HOLTER. [SEAL.]

Signed, sealed, & delivered in the presence of—

Approved by—

DECIUS S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

TERRITORY OF MONTANA,
Lewis and Clarke County, ss:

Samuel T. Hauser and Anton M. Holter, being first severally duly sworn, each for himself, deposes and says that he is worth the sum named in the within bond as the penalty thereof, over and above all his just debts, liabilities, and exemptions, and that he is a resident and freeholder in the Territory aforesaid.

S. T. HAUSER.
A. M. HOLTER.

Subscribed and sworn to before me, this 23rd day of August, A. D. 1878.

[NOTARIAL SEAL.] WM. CHUMASERO,
Notary Public.

193 In the supreme court, Montana Territory, August term, A. D. 1878.

CHARLES L. CLARK AND ANDREW J. DAVIS, plaintiffs in error,
vs.
SARAH J. FREDERICKS AND WELLINGTON A. Fredericks, defendants in error.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing one hundred and ninety-two pages, numbered from one to one hundred and ninety-two, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled action, as the same appear on file and of record in my office.

Witness my hand and the seal of said court, this first day of October, A. D. 1878.

[SEAL.] I. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 178. Andrew J. Davis and Charles L. Clark, plaintiffs in error, vs. Sarah J. Fredericks and Wellington A. Fredericks. Montana Territory, supreme court. Filed 19th April, 1879.